INTRODUCTION.

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We propose to make a few observations on the duties of justices of the peace, as introductory to the judgments of Chief Justice Wood, in the cases of the Queen vs. Schultz, and the Queen vs. Dease, which, at the request of many justices of the peace, and by order of the executive, we publish in pamphlet form.

These judgments will re-pay a careful perusal by all those whose duty or position it is to take part in the administration of criminal justice, either in *summary proceedings*, or in the preliminary investigations of *misdemeanors* or *felonies*.

Justices, at the present day, are, like those of ancient times, at the common law, charged with the preservation of the peace. Although their duties in modern times are very much circumscribed by statutes, still, at the common law, justices, by virtue of the general and wide meaning of their commission, have an extensive jurisdiction in matters pertaining to the *prevention* of a breach of the peace, and the *maintenance* of the peace in the several communities in which they reside and over which their jurisdiction extends; for the effectually accomplishing of which, they yet have ample powers at the common law. This may be done where they see a breach of the law is taking place, or about to take place, or is threatened under circumstances which show that, unless prevented, it will immediately take place, by the justice himself arresting, or ordering a peace officer to arrest, if need be without warrant, the offender, and by taking or causing him to be brought before him, and on examination before him, by binding him in his own, and, if thought necessary, in the recognizance of others, to keep the peace; or by committing him to custody, or otherwise dealing with him according to law. Other instances might be mentioned wherein, independently of any statutory powers, they exercise an important jurisdiction at the common law; but, as we have already remarked, the duties of justices are to a great extent, as respects both their

summary jurisdiction and their powers in regard to *misdemeanors* and *felonies*—as to the mode of procedure, the limitation of the punishment in summary convictions, and the bailing or committing for trial in indictable offences, prescribed with precision and accuracy, by what may be termed the criminal statutes, chiefly passed in 1869; and, as relating to justices, by what may be called the "Justices' Acts," 32-33, V. C. 30, and 32-33, V. C. 31. *Every justice of the peace should have by him these two Acts. Nay, more—he should have the whole criminal statutes of Canada, collected and published, as they have lately been by the Ottawa government, in one volume.* And there seems no reason why every justice of the peace in Manitoba should not have this latter volume furnished to him by the Provincial Secretary, who, without doubt, for the asking, free of cost, or at a trifling outlay, would be supplied with a sufficient number for that purpose, by the government at Ottawa.

With the aid and assistance of these statutes, the minute directions therein contained, and the various forms thereto appended, the inquiring and industrious justice of the peace will be seldom led astray; without this aid and assistance, he is liable to fall, and will almost inevitably, fall, into error at every step, in the proceedings—both in the matter of summary convictions, and in the preliminary investigation of indictable offences.

Space will permit only a few general directions. The first thing a justice should do, is to ascertain whether or not the matter complained of be an offence at all, and if so, whether at common law or by statute; and by what particular clause of the statute. The next question for the justice to determine is, assuming an offence to have been committed, whether or not it is an indictable offence, *i. e.*, a misdemeanor or a felony, or a less offence, and such as may be disposed of by a single justice, or otherwise, on summary trial. In the former case, he will follow the directions given in 32-33, V. C. 30, and use the forms appended to that statute, carefully selecting those provided for the proceeding he is taking;—in the latter case, he will follow the directions given in 32-33, V. C. 31; and for the several stages of the proceedings he will strictly follow the statute,—in no case, departing from the forms thereto appended, *particularly in the matter of drawing up the formal conviction in cases of summary proceedings.*

In the case of summary trials and convictions it is of great importance, that either before the trial has been entered upon, or at all events, before the defendant enters upon his defence, the matter of the complaint should be distinctly and clearly stated in an information, on oath, either before or at the beginning of the trial, or by amendment before the defendant enters upon his defence; for the information stands in the place of a declaration in the trial of a civil action, and of an indictment in the trial of a misdemeanor or a felony. It is not meant that the complaint should be set out in the information in any particular form, or set words; but it is meant that it should be described, not in technical language, but in the mode of speech and words in common use among the people, stating *what* is complained of, not what the *technical offence* is resulting therefrom, which generally, is not a narration of facts, but a conclusion flowing from facts. If the defendant pleads not guilty to the complaint charged in the information, issue is said to be joined, and the trial proceeds in all respects like trials at the sessions or assizes,

and is governed by the same rules as to the admissibility of evidence, and otherwise, as are applicable to cases of misdemeanors, tried at the sessions or assizes. If the complaint be dismissed, a dismissal should be drawn up in the form given in the statute; if the defendant be convicted, the conviction should be prepared with care, and should contain *all* that is required in the form in the general statute, given to be used in given cases of summary convictions, when special forms are not given in the particular Act under which the conviction is made. If costs are ordered to be paid, these should be liquidated, *i. e.* the precise sum specified, and stated in the body of the conviction, and to whom and for whom to be paid; and the conviction must state how and for what purpose the fine (if fine be imposed) is to be applied; and the term of imprisonment, if the statute allow it, on non-payment of the fine, or fine and costs; and care should be taken to make the term of imprisonment commence from the date of the conviction. And if a commitment in default of immediate payment of the fine, or fine and costs, or in default of sufficient distress, follow the conviction, it must recite the conviction, the non-payment of the fine, or fine and costs, or the want of sufficient distress; and then commit for the period named in the conviction, unless the fine, or fine and costs, be sooner paid; in which costs must be included the costs of carrying the defendant to the prison, if the same are intended to be charged against the defendant; or these latter costs must be ascertained and stated in the commitment, so that the defendant may know what and all he has to pay, in order to regain his liberty. If the defendant pleads *guilty* to, or *confesses* the charge in the information, then judgment should be pronounced, and the conviction drawn up after the form already referred to, reciting the information, and that "upon the same being read to the defendant he pleaded thereto "guilty," or he confessed the charge contained in the information," and then proceed to record the judgment in the conviction, and proceed thereon, as already directed, and in all respects as though the conviction was made after a trial.

Hitherto there appears to have been no regular return made by justices of summary proceedings before them to the Clerk of the Crown and Peace, as required by 32-33 V, C. 31, Secs. 76, 77, 78, as amended by 33 V, C. 27, Sec, 3. A heavy penalty is most properly imposed for default in not complying with the law in this respect; and we hope it will hereafter be deemed the duty of the court to call the attention of the Clerk of the Crown and Peace to any omissions of duty of this kind on the part of Justices of the Peace, and to direct their prosecution for the penalty imposed by the Statute.

Another matter has attracted our observation. It would seem the only fees that may be legally taken by Justices of the Peace, and by their clerks are those fixed by an ordinance of the Council of Assiniboia, passed the 3rd November, 1864. The scale is as follows:—Every warrant 2s 6d sterling, equal 63 cents, of which the Justice is to retain 1s 6d, (37 cents), and to pay over the remaining 1s, (25 cents), to the constable, as compensation for executing the warrant; and for every mile he may travel beyond the five miles, the constable is to be paid two pence mileage. The ordinance then adds:—

"*The General Court shall be authorized to adopt such scale of fees as to the court "itself may appear proper.*"

IV.

The powers of the General Court of Assiniboia, have passed over to, and are now possessed by the Court of Queen's Bench, which it would seem now has in itself the authority of making such a scale of fees as to it may appear proper.

It does not appear that any scale of fees, except as aforesaid, has ever been legally established in this Province. In the older Provinces each had, at the union, its magisterial and constabulary tariff of fees differing in some respects, the one from the other; and each Province has retained, and assumed the right, to deal with its own tariff. It is presumed, therefore, that the Court of Queen's Bench may deal with the question in Manitoba.

However, until that is done, and in the absence of any scale of fees *established by law*, since Justices should be entitled to charge what is fair and reasonable, it is suggested the scale established in Ontario (Con : Stets. U. C. chapter 119) should be adopted and followed by Justices of the Peace. It is as follows :—

JUSTICES.

Information and warrant or summons	0.50
Every copy of summons	0.10
Subpœna (only one on each side)	0.10

Note. It is not necessary to serve copy of subpœna, all that is necessary is to show the subpœna and read and warn the witness. Any number of witnesses may be put in the same subpœna.

Every recognizance, only one to be charged in each case	0.25
Every certificate of recognizance under the Act respecting estreats	0.25
Information and warrant for surety of the Peace for good behavior, to be paid by complainant	0.50
Every warrant of commitment in default of surety to keep the peace	0.50
For hearing and determining a case	0.50
For warrant to levy penalty	0.25
For making up record of conviction	1.00
For copies of proceedings or papers when demanded per folio of 100 words	0.10
Every bill of costs in detail when demanded	0.10

Note.—No allowance to be made to or for any clerk.

CONSTABLES.

For fees to be allowed by Justices of the Peace to constables following the scale for like services in Ontario, it is suggested may be as follows :—

Executing every warrant to arrest, besides mileage	1.00
Serving every summons, each defendant	0.50
Summoning or warning each witness on a subpœna	0.25
Every attendance at the hearing before a Justice, if half a day or less	1.00
If over half a day and not more than one day	2.00
And after that rate for any longer time.	
Receiving and returning warrant of distress	1.00

Poundage on money made, besides actual disbursements, on the $100	5.00
Conveying and delivering prisoner to gaoler, besides mileage	1.00
Mileage on such conveyance per mile	0.25
All other mileage necessarily travelled in executing or serving papers or process, counting one way, per mile	0.20

Note.—Any service not specially named to be allowed for by the Justice on a scale in proportion to the items specified.

WITNESSES.

For attendance before a Justice, if residing within 3 miles of the Justice, for half a day or less	1.00
Over a half a day and not exceeding a day	1.50
Over one day at the rate above mentioned, and to those residing or being upwards of 3 miles from the Justice, at the rate per mile, counting one way	0.20

In the case of indictable offences, where the initiatory proceedings are taken by a Justice of the Peace, no fees are allowed to Justices. Of course, constables, for their own services, in respect of such offences, will be paid by the Treasurer of the Province, Yet, even in these cases, there are certain misdemeanors which partake so largely of civil trespass between party and party, that the expenses thereof may well be thrown upon, and borne by the party in the wrong, as shall be evidenced by the final determination of the litigation. But our limits will not permit us to enter into a discrimination of such cases.

For the conduct and procedure in indictable offences we must refer Justices of the Peace to 32-33 V., C. 30, and to the judgment of the Chief Justice in the Queen vs. Schultz, wherein their duties are set forth with great particularity and minuteness.

JUDGMENT

—IN THE—

QUEEN VS. DEASE,

HABEAS CORPUS.

QUEEN'S BENCH. (Crown side.)

In Chambers, August 11th, 1875.

Coram : Wood, C. J.

Regina vs. William Dease, the younger.

The defendant in this case was on the 13th day of July, 1875, on the information of Ka-qua-koni-ash, an Indian, upon the evidence hereinafter set out, and upon his own confession, at North Pembina, in the County of Provencher, by and before F. T. Bradley, a Justice of the Peace, in and for the Province of Manitoba, convicted of having, at an Indian encampment on the Rosseau River, in the county aforesaid, given int xicating liquor, namely whiskey, to a certain Indian by the name of Ka-qua-koni-ash, to drink, contrary to the statute, 37 V, C 21 ; and he was on the fifteenth day of July, 1875, in pursuance of a commitment based on the conviction, delivered to the gaoler of the common gaol of Manitoba, in Winnipeg, where he now is.

On the 22nd of July, 1875, Mr. O'Rielly, on filing an affidavit setting forth in brief the above facts, and pointing out certain alleged defects in the warrant of commitment, a copy of which was annexed to the affidavit, moved for, and obtained a summons, calling on the convicting justice, forthwith, after service of the said summons upon him, to file with the Clerk of the Crown and Peace, at Winnipeg, the formal conviction on which the said commitment purports to be based ; and on notice ordered the said gaoler to produce before me all warrants or other documents in his possessions relating to the reception and detention in prison of the said William Dease, the younger ; and I further ordered the said Jus-

tice, three days after service of my said summons upon him, to show cause why the said conviction and commitment should not be set aside and the said Dease be altogether discharged from custody, on the ground that they or one of them, are or is, bad in substance, as not disclosing any sufficient cause in law for the detention of the said Dease—the said commitment not showing that any conviction had been made—being wrongly directed—assigning a place of imprisonment not warranted by the statute, and not stating with legal certainty any offence, and other defects in the said conviction and commitment.

The summons was returned served, and the conviction, information, depositions, and other papers, were returned and filed with the Clerk of the Crown and Peace by the Justice, and the same were produced on the hearing of the summons; and at the same time the gaoler appeared and produced two warrants of commitment, marked as having been received at different times—number one, on the fifteenth day of July, 1875, and number two, on the twenty-sixth day of the same July—he having received both from the said Justice, the one through the constable who brought the said Dease to the gaol, and the other through Mr. Carey, acting for the Crown in this case; under which latter warrant, number two, the gaoler held and detained the said Dease. The information, conviction, and warrants of commitment are as follows:—

INFORMATION.

"Canada, Province of Manitoba, County of Provencher.

Information and complaint of Ka-qua-koni-ash, in the Parish of St. Agathe, taken upon oath this first day of July, 1875, at West Lynne in the Parish of St. Agathe, before the undersigned, F. T. Bradley, one of Her Majesty's Justices of the Peace, in and for the Province of Manitoba, who saith: That on the evening of the 29th day of June, one William Dease, Junior, and brother, whose Christian name I know not, came to my camp situated on the River Rosseau, and brought with him a keg of whiskey which he gave freely to myself and all the Indians present, and after having placed me under the influence of liquor took forcible possession of two of my horses with which he left.

Sworn before me at West Lynne, this first day of July, 1875.

(Signed) F. T. Bradley."

CONVICTION.

"Canada, Province of Manitoba, County of Provencher, North Pembina.

Ka-qua-koni-ash, Prosecutor, and William Dease, Defendant.

Be it remembered that on the thirteenth day of July, in the year of Our Lord one thousand eight hundred and seventy-five, at North Pembina, in the County of Provencher, in the Province of Manitoba, William Dease, the younger, of the Parish of St. Agathe, in the County and Province aforesaid is charged upon oath before me, the undersigned, one of Her Majesty's Justices of the Peace, duly commissioned of the Peace, in and for the Province of Manitoba, for that he, the said William Dease, the younger, did unlawfully, on or about the twenty-ninth day of June, last, now past, in the year aforesaid at an Indian encampment on the Rosseau River, in the County and Province aforesaid, give to an Indian

man named Ka-qua-koni-ash, but not in case of sickness, nor under the sanction of any medical man, nor under the direction of a minister of religion, a certain kind of intoxicating liquor to drink, to wit, whiskey, against the form of the Statute in such case made and provided, to which said charge, so made, upon oath before me, he the said William Dease, the younger, pleads guilty and is convicted thereof before me; and it is thereupon by me adjudged that the said William Dease, the younger, for his said offence shall be imprisoned in the common jail of the Province of Manitoba, for and during the space of six calendar months, to be computed from the date hereof: and it is further adjudged by me that for his said offence of which he stands so convicted, the said William Dease the younger, shall further be fined in the sum of two hundred dollars, one half of the said fine of two hundred dollars to be paid to the aforesaid Ka-qua-koni-ash, and the other half to Her Majesty the Queen, to be applied according to law, together with the sum of sixty-six dollars and eleven cents, to be paid to the said Ka-qua-koni-ash for his costs incurred in this behalf; and it is further adjudged by me that if the said several sums be not immediately paid, the said William Dease, the younger, shall be further imprisoned in the said common gaol, for and during the space of twelve calendar months, to be computed and reckoned from the day of the expiration of the aforesaid imprisonment of six months, unless the said several sums shall be sooner paid.

Given under my hand and seal on the day, and year first above mentioned, at North Pembina, in the County and Province aforesaid.

(Signed) F. T. BRADLEY.

COMMITMENT NUMBER ONE.

"Canada, Province of Manitoba, County of Provencher.

To the Keeper of the Provincial Penitentiary of the Province of Manitoba, greeting:—Whereas William Dease, Junior, of the Parish of St. Norbert, in the said County of Provencher, stands charged upon oath with having given spirituous liquor to Indians, and having pleaded guilty to such charge was fined in the sum of two hundred dollars and costs, together with six (6) months imprisonment at hard labor—these are therefore to authorize and command you to receive into your custody in the said Provincial Penitentiary the body of the said William Dease, Junior, and safely him keep for the period above mentioned, to be retained in custody until the said fine shall have been paid according to law.

Given under my hand and seal at North Pembina this thirteenth day of July, 1875, in the 39th year of Her Majesty's reign.

(Signed) F. T. BRADLEY, J.P."

COMMITMENT NUMBER TWO.

"Canada, Province of Manitoba, County of Provencher.

To all or any of the Constables and other Police officers, and to the keeper of the common gaol of the Province of Manitoba.

Whereas William Dease, the younger, late of the Parish of St. Agathe, in the County of Provencher in the Province of Manitoba, was on this day convicted before me, the undersigned one of Her Majesty's Justices of the Peace, in and for the Province of Manitoba, for that he the said William Dease the younger,

on or about the twenty-ninth day of June now last past, A. D. 1875, at an Indian Encampment, on the Rossean River, in the County and Province aforesaid, did unlawfully give an Indian man named Ka-qua-koni-ash, but not in case of sickness, nor under the sanction of any medical man, or under the direction of a minister of religion, a certain kind of intoxicating liquor to drink, to wit, whiskey, against the form of the statute in such case made and provided, and it was thereby adjudged that the said William Dease, the younger, for his said offence, should be imprisoned in the common jail of the Province of Manitoba, for and during the space of six calendar months, to be computed from the date of the said conviction; and it was thereby further adjudged that for his said offence the said William Dease, the younger, should further forfeit and pay a fine of two hundred dollars, one half of the said fine of two hundred dollars to be paid to the said Ka-qua-koni-ash, and the other half to Her Majesty the Queen, to be applied according to law, together with the sum of sixty-six dollars and eleven cents, to be paid to the said Ka-qua-koni-ash for his costs incurred in that behalf; and it was thereby further adjudged that if the said several sums be not immediately paid, the said William Dease, the younger, should be further imprisoned in the aforesaid common jail for and during the space of twelve calendar months, to be computed and reckoned from the day of the expiration of the aforesaid imprisonment of six months, unless the said several sums should have been sooner paid; and whereas the said William Dease, the younger, stands so convicted of the aforesaid offence; and whereas the said William Dease, the younger, hath not paid the same or any part thereof, but therein hath made default: These are therefore to command you the said constables or peace officers, or any of you, to take the said William Dease, the younger, and him safely convey to the common gaol of the aforesaid Province, and there to deliver him to the said keeper thereof, together with this precept; and I do hereby command you the said keeper of the said common gaol to receive the said William Dease, the younger, into your custody in the said common gaol, there to imprison him for the space of six calendar months, to be computed from the thirteenth day of July instant, A. D. 1875; and I do hereby further command you the said keeper of the said common gaol to further keep and imprison the said William Dease, the younger, in the said common gaol for and during the space of twelve calendar months, to be computed and reckoned from the date of the expiration of the aforesaid imprisonment of six months, for his aforesaid default of payment of the said several sums of which he stands adjudged, unless the said several sums shall be sooner paid unto you, the said keeper; and for your so doing this shall be your sufficient warrant.

Given under my hand and seal at North Pembina, in the County and Province aforesaid, and on the thirteenth day of July, in the year of our Lord 1875.

(Signed) F. T. BRADLEY, J.P."

THE ARGUMENT.

Mr. O'Rielly in moving the summons absolute to set aside the conviction and commitments, stated the following grounds:—

1. The conviction is bad for

awarding imprisonment for money penalty attached to the class of offences firstly mentioned in 37 V. C 21, sec. 1, subsec. 1, (under which the conviction purports to be made), as there are in sub secs. 1 and 2, three distinct classes of offences created, and to each class the statute affixes a distinct and seperate penalty, in no way affected or controlled by the penalties assigned to the other classes of offences. For the offences firstly mentioned in sec 1, subsec 1, the Statute says the offender "*shall be liable to imprisonment for a period not exceeding two years, AND be fined not more than five hundred dollars;*" and for the class of offences secondly mentioned in the same subsection the offender "*shall be liable to be fined "not exceeding five hundred dollars;" "and in default of immediate payment "of SUCH FINE, any person so "fined, may be committed to any com- "mon gaol, house of correction, lock- "up, or other place of confinement, for "a period of not more than twelve "months, or until such fine shall be "paid;*" and for the class of offences thirdly mentioned, and contained in sec 1, sub sec. 2, the offender "*may be condemned to pay a penalty, "not exceeding one hundred dollars, "nor less than fifty dollars, and the "costs of the prosecution, and in default "of immediate payment, the offender "may be committed to any common "gaol, house of correction, lock-up or "other place of confinement, for any "time not exceeding six months unless "such fine and costs are sooner paid.*"

2. The conviction is bad for awarding imprisonment for costs, the Statute giving no authority to impose costs in addition to the fine, and in any event not imprisonment for their non-payment.

3. The conviction is bad for awarding the imprisonment, in default of the fine and costs being not immediately paid, for a period to commence at the expiration of the *substantive penalty of six months' imprisonment for the same identical offence awarded in the same conviction*: if there be any authority for the imposition of imprisonment for non-payment of the fine and costs awarded in and by the conviction, (which is denied) the term or period of imprisonment should have been made to begin at the date of the conviction and so to run, for the time of the substantive and absolute award of imprisonment, concurrent therewith.

4. In any view, commitment number one was the warrant by virtue of which Dease was carried to, and received into, and detained in prison, at all events until warrant number two was delivered to the gaoler; and therefore must be held to be the warrant under which he was and is held. It is not competent for the Justice to displace it by substituting another warrant in its stead; nor is it competent to the judge to amend the warrant *in matter of substance*, although he may have before him a good conviction by which to amend.

5. The warrant of commitment number one is obviously and admittedly defective in substance. Therefore, on all, or some one of the grounds stated, the prisoner should be discharged from imprisonment.

The Clerk of the Crown and Peace, *contra.*

To the first ground of objection Mr. Carey replied by reading 37 V. C. 21, sec 1 subsecs 1 and 2, and pointing out that although the provision, "*and in default of immediate "payment of such fine any person so "fined may be committed to any com-*

"*mon gaol, house of correction, lock-up,* "*or other place of confinement by the* "*justice of the peace before whom the* "*conviction shall take place, for a peri-* "*od of not more than twelve months, or* "*until such fine shall be paid;*" viewed by itself, may, at first sight, be supposed to be limited to the second class of offences mentioned in the sub-section, yet when taken in connection with what precedes it and read with, "*and in all cases arising* "*under this section, Indians shall be* "*competent witnesses; but no penalty* "*shall be incurred in case of sickness* "*where any intoxicating liquor is made* "*use of under the sanction of any med-* "*ical man or under the directions of a* "*minister of religion,*" immediately following, and correcting the punctuation by substituting a *semi-colon* for the *comma*, erroneously placed between the words "*mentioned*" and "*and,*" (as shown by the French version,) the conclusion was irresistible, that all of sub-section 1, commencing with, "and in default of immediate payment," &c., to the end of the sub-section, applied as well to the first as to the second class of offences. He called attention particularly to the exemption, "but no penalty shall be "incurred in case of sickness where "any intoxicating liquor is made use "of under the sanction of any medi-"cal man or under the directions of "a minister of religion." Any one must see that this was intended to apply, and does apply, as well to the first, as to the second class of offences. Reference was also made to statutes in *pari materia*, to the rules of construction laid down in *Dwarris*, and to the commentaries of *Paley* and other text writers.

To the second ground, Mr. Carey answered, by citing 32-33 V. C. 31, secs 53, 54, 55, and 56.

Mr. Carey contended that the third objection was untenable, for the statute clearly intended a cumulative punishment, which could not be inflicted were the construction insisted on by Mr. O'Rielly correct.

To the fourth objection it was answered, that the authorities were conclusive that the justice might substitute subsequent commitments for the first, even down to the actual return of a *habeas corpus* or a *certiorari*; and several very recent cases were cited in support of this contention. Even were the commitment defective in either form or substance, the justice might correct it under the latter part of 32 33 V., C. 31, S. 71 :—"And no "warrant of commitment shall be "held void by reason of any defect "therein, provided it be therein al-"leged that the party has been con-"victed, and there be a good and "valid conviction to sustain the same." See also, Paley 292, 293, 374, 375; and the note K. on the latter page.

Mr. Carey contended he had disposed of the fifth ground in his answer to the fourth objection; and he thereupon submitted that no legal ground had been stated or suggested entitling the defendant to be discharged; on the contrary, that the record of his conviction and his commitment were in due form of law and within the express provisions of the statute in pursuance of which the defendant stands convicted and committed.

THE ADJUDICATION.

The defendant is convicted and committed under 31 V., C. 42, and 32 33 V. C. 6 as it stands amended in sec 1 of 37 V., C. 21. The words of the Statute are—(sec 3, sub-sec 1) :—

"Whosoever sells, exchanges with, barters, supplies, or gives to any Indian man woman or child in Canada, any kind of intoxicating liquor, or causes or procures the same to be done, or connives or attempts thereat, or opens or keeps, or causes to be opened or kept, on any land set apart or reserved for Indians, a tavern, house, or building where intoxicating liquor is sold bartered, exchanged, or given, or is found in possession of intoxicating liquor in the house, tent, wigwam, or place of abode of any Indian, shall on conviction thereof before any Justice of the Peace, upon the evidence of one credible witness other than the informer or prosecutor, be liable to imprisonment for a period not exceeding two years, and be fined not more than five hundred dollars, one moiety to go to the informer or prosecutor, and the other moiety to Her Majesty, to form part of the fund for the benefit of that tribe or body of Indians with respect to one or more members of which the offence was committed; and the commander or person in charge of any steamer or other vessel or boat, from or on board of which any intoxicating liquor shall have been sold, bartered, exchanged, supplied, or given, to any Indian man, woman or child, shall be liable on conviction thereof before any Justice of the Peace, upon the evidence of one credible witness other than the informer or prosecutor, to be fined not exceeding five hundred dollars for each such offence, the moities thereof to be applicable as herein before mentioned;* and in default of immediate payment of such fine any person, so fined, may be committed to any common gaol, house of correction, lock-up, or other place of confinement by the Justice of the Peace before whom the conviction shall take place, for a period of not more than twelve months, or until such fine shall be paid; and in all cases arising under this section, Indians shall be competent witnesses, but no penalty shall be incurred in case of sickness where any intoxicating liquor is made use of under the sanction of any medical man, or under the directions of a minister of religion."

It may not be improper to premise a few remarks on the practice in relation to the imprisonment of persons under color of legal process on commitments based upon summary convictions, and on commitments on charges of misdemeanors and felonies awaiting trial, where it is desired to make inquiry into the legality of such imprisonment. The old practice was to obtain an order directing the issue of a writ of *habeas corpus*, addressed to the gaoler or person having the custody, or restraining the liberty of the applicant. Upon the return of this writ, if sufficient legal cause were shown for detention, and no exception could be taken against the face of the proceedings as appearing on the return, or if any, only such as might be amended, the applicant might ask for a *certiorari*, and thereby bring before the judge or court the conviction, and all other or anterior proceedings leading to the conviction, or anterior to, but leading to, and connected with, the restraint of liberty; and it would seem from a review of all the authorities, that at common law, in every case of restraint of liberty, amounting to imprisonment, including the cases provided for in 31, Car., 2 C. 2, and 56 Geo. 3, C. 100, the writ of *habeas corpus* and of *certiorari* may issue, and that the allegations in the returns to the writs may be subjected to examination and inquisition, and may be controverted by affidavits to the extent of showing that, admitting what is alleged, in fact no offence was committed, or that there was no jurisdiction, or that there was no evidence giving jurisdiction, or that the offender admitted or confessed one offence and was convicted of another and different offence; and the whole ground of the imprisonment may be reviewed, but so as not to overrule any conclusion of fact, based on admitted evidence, or any judgment, absolutely in the discretion of the imprisoning authority, pronounced according to law.

I do not think it of any advantage to

*In the English version this point is a comma: in the French version a semi-colon. *Rep.*

say anything further respecting the cases which arise under 31 Car. 2, C. 2, relating only to "persons in custody for criminal or supposed criminal matters," except treason and felony, and under 56 Geo. 3, C. 100, relating to those only "who are committed or detained otherwise than "for some criminal or supposed "criminal matter, and otherwise "than for debt or process in any civil "suit," as all these have their basis in the common law; and the former statute only made the issue of the writ obligatory in certain cases under heavy penalties, and the latter statute in certain cases enlarged, not the common law itself, but only its practice; so that to this day, under whatever circumstances it may be issued, the writ of *habeas corpus* is not a statutory but a common law writ; and in all cases I think the party suing it out, may be entitled to the inquiries and to the investigation I have indicated.

The mode of procedure in this case by summons and order contained in it, I think more convenient, and less expensive, than the issue of writs of *habeas corpus* and *certiorari;* and unless some good reason shall be shown for pursuing a different course, I see no objection to its being followed in the future.

The defendant, Dease, resides on a farm on the west side or bank of the Red River, some fifteen miles or so up the stream, from Winnipeg towards Dufferin. On the evening of the 29th of June, he, with his brother Alfred Dease, is found with a horse and waggon on the east side of the Red River, not far from opposite Dufferin, at an Indian settlement or encampment on the Rosseau River, which empties into the Red River, thirty or thirty-five miles from his home. What he there did that evening, and what he and his brother Alfred did the next morning, will appear from the following depositions, taken before the convicting justice and returned by him to the Clerk of the Crown and Peace.

KA-QUA-KONI-ASH being sworn saith: I am one of the soldiers of the Rosseau tribe, residing below the rapids on the Rosseau River. About sun down, when I arrived at my camp, before I got home I saw some were under the influence of liquor. When I was through with my meal, the prisoner whom I recognize, came to me. The prisoner then asked me if I would drink, and I assented. I I took a drink of whiskey, and then went into my lodge. The prisoner, Dease, followed me into my lodge, with the bottle which I took out of his hand. Dease's brother then came into the lodge, but did not drink. The prisoner, William Dease then went out, and brought in a larger bottle from which I drank, and the prisoner also drank with me. O-taw-wa-que, also drank. When I felt myself getting under the influence of what I had drank, I put away the bottle. I then went outside and did not ask Dease for any more liquor; but he said he had not any more. Dease asked me then to come along with him, and I went in his cart. Dease then asked me, if I would give him a horse, and I said no; I told Dease I could not make any such bargain. I was still under the influence of liquor. Two Indians followed the cart, one of them my brother, the other my nephew. When I got into the cart, I understood I was going to Dease's camp; Dease asked the boys to drive my band of horses down to the camp. After I arrived at Dease's camp, my wife, and also

O-taw-wa-que and Wa-na-we-na-non, arrived in Dease's camp; Dease then took two of my horses and placed them in an enclosure. I was afraid to resist Dease in taking my horses, for fear of bloodshed. The horses taken from me were a bay stallion, and an iron gray gelding. Besides the Indians mentioned in my evidence, there was one Mr. John K. Wright present. Dease paid me no money for the horses taken from me. I recognize these flasks as the remains of the liquor Dease left in my camp. out of the first bottle I had four drinks, out of the second bottle I had only one drink. I did not go after Dease immediately, for I thought he would let my horses go again, but I saddled a horse shortly after, and followed him crossing the Red River, near Fawcett's saloon, and found Dease had left for his home. I then came up and laid the information. While Dease was taking my horses, I saw my brother offering resistance, and saw Dease strike him; this was the reason that I did not make resistance. This took place on the evening of the 29th and the morning of the 30th.

his
(Signed) KA X QUA-KONI-ASH.
mark.

Taken before me, at West Lynne, this 12th July, 1875.

(Signed) F. T. BRADLEY, J. P.

WA-NA-WE-NE-NON being sworn saith:—

I am one of the chiefs of the Rosseau tribe. I recognize the prisoners at the bar as Alfred and Willian Dease, who came to our camp the night before Ka-qua-koni-ash laid the complaint, in a waggon. I was not present at the moment of their arrival, being absent from camp a short time, but found them there on my return. When I first saw Dease he was lying on his side in the waggon. I shook hands with Dease; and he asked me would I take a glass of whiskey, if there was any to be had? I did not reply, but smiled. Then Dease again asked me if I would not take a glass. I again smiled—and said yes. Dease then poured out some whiskey into a pot from a keg and gave it to me to drink. A good while after, Dease asked me to take another drink, and I took another. It was whiskey he gave me. William Dease drank also, but I did not see the younger brother drink. A good while after Dease gave me another drink. Ka-qua-koni-ash arrived just as I was taking the third glass. I did not see Ka-qua-koni-ash getting any liquor. I did not hear Ka-qua-koni-ash make any bargain about the horses. I followed the rest the following morning when Dease was taking the horses away I went down, as I thought there was something wrong going on, and I wanted to see. When I was about leaving, I saw Ka-qua-koni-ash and Na-shaw-so trying to get their horses. I saw Dease push Na-shaw-so down. He hit him a little, but not hard; and I said to the Indians that were there, "Let us leave them and go home.

his
(Signed) WA-NA-WE X NA-NON.
mark.

Taken before me at West Lynne, this 12th July, 1875.

(Signed) F. T. BRADLEY, J. P.

NA-SHAW-SO being sworn saith:—

I was in camp the night Willam Dease arrived. I recognize William Dease and his brother, now present, as the parties who arrived in camp. He gave me, among other Indians, a drink of whiskey from a bottle which he poured into a small pot and hand-

ed to me. I don't remember how many drinks I took before I became drunk, but in the meantime I saw Dease giving whiskey to other Indians present. I don't recollect when Ka-qua-koni-ash arrived, for I was then drunk from the effects of liquor I had then received from Dease. I got sober early in the morning. This was the morning before Ka-qua-koni-ash left to lay the complaint. I was not quite sober when Ka-qua-koni-ash left in the cart. I think Ka-qua-koni-ash was pretty drunk when they started in the cart. I followed after them, and saw William Dease driving the band of horses. They were driving these horses in the direction of Jno. K. Wright's house. The horses referred to, were a band belonging to Ka-qua-koni-ash. They then drove them into J. K. Wright's enclosure, near his house. I saw Dease taking two horses from the enclosure. One was already outside, and he had hold of the other, a bay stallion. While Dease had the gray horse by the halter, I went up to resist him taking them away; Dease pushed me down, and then struck me I was not hurt badly; I got up, but made no further resistance; I was then getting sober, but remember perfectly Dease taking the horses. I saw Ka-qua-koni-ash pushed away by John K. Wright while endeavoring to recover his horses. I thought Wright was interested with Dease from his action. When we found we could not recover our horses we went back to camp. I know of no money being paid.

his
(Signed) NA x SHAW-SO.
mark.

Taken before me at West Lynne, this 12th July, 1875.

(Signed) F. T. BRADLEY, J. P.

FRANCIS RANVILLE being sworn saith: I know the prisoner, William Dease, but I do not know the younger prisoner. On the evening of the 30th I met the prisoner, William Dease, on the road behind Dufferin with two horses tied behind the waggon, one which I recognized to be the property of Ka qua koni-ash. I did not speak to him, but concluded he was on his way to Winnipeg; the horse which I recognized as the property of Ka-qua-koni ash was a gray horse. I saw one of the prisoners at the bar with William Dease but did not know him to be his brother.

his
(Signed) FRANCIS x RANVILLE.
mark.

Taken before me at West Lynne, this 12th July, 1875.

(Signed) F. T. BRADLEY, J. P.

The foregoing depositions abundantly prove that the offence firstly described in the substituted sec. 8, sub-sec. 1, which I have quoted was committed by William Dease, the younger, the defendant, who, if this was doubtful, has put the matter at rest by confessing it. That the convicting justice had jurisdiction summarily to try and determine the charge, is equally well established; and no question can be raised as to the defendant having been properly and clearly charged with the offence before the convicting justice, so that he perfectly understood the nature and extent of the offence to which he pleaded guilty, and which as I have said was abundantly proved against him by more than one credible witness other than the informer or prosecutor. As respects the jurisdiction of the convicting justice, and as respects the fact of an offence in law, having been committed, and as respects the proof of the commission of

that offence by the evidence of such witnesses as the law requires, I think, as I have already said, I may make full inquiry into all the circumstances, from all the evidence, depositions or other proofs, properly placed before me; and to that extent I may review the judgment of the convicting justice; within these limitations, however, I am, on authority, confined; but as respects the weight to be attached to evidence leading to the conclusion of fact one way or the other, as to the actnal commission of the offence, and the identity of the person who committed the offence, and the penalty to be imposed, (always, of course, assuming that it is within the limits prescribed by law), I have no power or authority of inquiry or review—the law having delegated these matters without review, at all events in this form of procedure, absolutely to the convicting justice, with this reservation, however, that the defendant may have a re-hearing on the question of fact, by making his appeal to the next sessions, or in this Province, to the next assizes. (Wilson's case, 7 Q. B. 1010, Re Eggington 2 E. & B. 717, Exparte Dakins 16, C. B. 77, Regina vs. B. W., St. Olives 8, E. & B. 529, In re Baily 2, E. & B. 607, Exparte Cross 2 H. & N. 354, In Washbury Union 4 E. & B. 314. Regina vs. Grant 14, Q. B. 63. Regina vs. Wilson 6, Q. B. 620. Re Thompson 6 H. & N. 193. In re Bailey 3, El. & B. 605.)

I have now to dispose of the questions of law stated by counsel on the argument.

I have already quoted the section of the Act under which the conviction was made. Properly to consider and interpret the language of that section reference should be had to the language employed in 31 V, C. 42, sec. 12, and 32—33 V, C. 6, sec. 3, for which section 3 in the latter Act, section 1 of 37 V., C. 21, is substituted.

31 V, C. 42, sec. 12 reads:—

"No person shall sell, barter, exchange, or give any Indian man, woman or child, in Canada, any kind of spirituous liquors, in any manner or way, or cause or procure the same to be done for any purpose whatsoever; and if any person so sells, barters, exchanges or gives away any such spirituous liquors to any Indian man, woman, or child, as aforesaid, or causes the same to be done, he shall on conviction thereof, before any justice of the peace, upon the evidence of one credible witness, other than the informer or prosecutor, be fined not exceeding twenty dollars for each such offence, one moiety to go to the informer or prosecutor, and the the other moiety to Her Majesty to form part of the fund for the benefit of that tribe, band or body of Indians with respect to one or more members of which the offence was committed; but no such penalty shall be incurred by furnishing to any Indian in case of sickness any spirituous liquor, either by a medical man or under the direction of a medical man or clergyman."

And 32-33 V, C. 6, sec. 3 says:—

"Any person who shall sell, barter, exchange, or give to any Indian man, woman, or child, any kind of spirituous or other intoxicating liquors, or cause or procure the same to be done, or open and keep or cause to be opened and kept on any land set apart or reserved for the Indians, a tavern, house or building, where spirituous or intoxicating liquors are sold or disposed of, shall, upon conviction, in the manner provided by section twelve of the

said Act, thirty-first Victoria, Chapter forty-two, be subject to the fine therein mentioned; and in default of payment of such fine, or of any fine imposed by the above mentioned twelfth section of the said Act, any person so offending may be committed to prison by the Justice of the Peace before whom the conviction shall take place, for a period not more than three months, or until such fine be paid; and the commander of any steamer or other vessel or boat from on board or on board of which any spirituous or other intoxicating liquor shall have been, or may be, sold or disposed of to any Indian man woman, or child, shall be liable to a similar penalty."

It is a general rule that a conviction, being an entire judgment, must be good throughout. If any material part of a conviction be faulty, the whole is vitiated, (R. v. Catherall, 2 Str. 900.) The offence, as well as the jurisdiction, must be shown by the conviction to be clearly within the statute creating the offence, and conferring the jurisdiction; and being clearly manifested in the conviction, the court will not be astute in the discovery of defects; yet every instrument which is to affect a man's liberty or property, out of the common law, ought, on the face of it, to show sufficient authority for what it aims to accomplish (11 Q.B. 455.) The court can intend nothing in favor of convictions, and will intend nothing against them. (R. v. Hazell 13 East 141.) The rule for jurisdiction is that nothing shall be intended to to be out of the jurisdiction of a superior court, but that which specially appears to be so; nothing shall be intended to be within the jurisdiction of an inferior court, but that which is so expressly alleged. (Peacock v. Bell 1 Saund 74.)

In construing an Act of Parliament relating to any subject, care must be taken, first, to ascertain what the common law, and what the statute law, were, bearing upon the same matter, prior to and at the passing of the Act in construction.

The reason of the law, that is, the motive which led to the making of it, is one of the most certain means of establishing its true sense.

A construction which tends to render an Act null and without effect, either in the whole or in any part, should be rejected, unless necessitated by the words and sentences employed.

That which helps most in the discovery of the true meaning of a law is the *reason* of it, or the *cause* which moved the legislature to enact it.

The popular, or received import of words, furnishes the general rule for the interpretation of statutes.

It is the duty of courts so to construe statutes as to *meet the mischief* and *advance the remedy*, and not to violate fundamental principles.

Statutes must be interpreted according to their intent and meaning, and not always according to the letter.

The intention of the legislature may be found from the Act itself, or from other Acts in *pari materia;* and sometimes from the cause or necessity of the Statute, and whenever the intent can be followed with reason and discretion, though such construction seem contrary to the letter of the statute. This is the rule where the words of the statute are obscure.

A thing within the *intention* is within the Statute, though not within the letter; and a thing within the letter, is not within the statute, un-

less within the intention.

In the construction of a statute, every part of it must be viewed in connection with the whole, so as to make parts harmonize if practicable, and give a sensible and intelligent effect to each. It is not to be presumed that the legislature intended any part of a statute to be without meaning.

That which is implied in a statute is as much part of it as what is expressed.

It is not permitted to interpret what has no need of interpretation. When an Act is expressed in clear and precise terms, when the sense is manifest and leads to nothing absurd, there can be no reason not to adopt the sense which it naturally presents. To go elsewhere in search of conjectures in order to restrain or extinguish it, is to elude it.

Applying the foregoing rules and principles to the construction of 37 V, C. 21, sec. 1, sub-sec. 1, and reading that sub-sec. in connection with 31 V, C. 42, sec. 12 and 32-33 V., C. 6, sec. 3, and looking at the *reason* or *motive*, first, for the passing of 32-33 V., C. 3, in amendment and enlargement of the prior Act, and secondly, for the passing of 37 V., C. 21, sec 1, sub-sec 1, still further enabling, enlarging, and extending the remedy against the mischief aimed at in the first Act, if otherwise I had any doubt as to the proper construction of the clause in question, that doubt would be entirely removed. The clause mentions two classes of cognate offences. To the first, it affixes the penalty of imprisonment AND fine—to the latter, a money penalty only; and it then declares that "in defanlt of immediate payment of *such fine*"—as much the fine in the one class of cases as in the other—following the words of the clause it replaces: "any person so fined may be committed, &c." To give any other meaning to the clause would, I think, render an important part of the clause nugatory, and would make the imposition of a fine upon the offender obligatory upon the justice, while it provided no means by which that penalty could be enforced. I think the grammatical construction of the clause is, that the money penalty mentioned in the clause for any offence therein described, if not immediately paid may be enforced by imprisonment; that all the residue of the clause, beginning with:—"and in default of immediate payment of such fine, &c.," applies equally to all the offences previously mentioned in the clause; and for myself I should never have hesitated a moment about it, had not a contrary meaning been strongly insisted upon by the learned counsel for the defendant.

The second objection is fully answered by the learned Clerk of the Crown and Peace, by citing 32-33 V, C. 31, secs, 53, 54, 55 and 56.

The third objection is that the imprisonment in default of the pay of the fine and costs is fixed to commence at the expiration of the substantive period of six months' imprisonment imposed for the *same* offence; whereas, it is contended it should have been made to begin at the date of the conviction, and run *pro tanto*, concurrent with the definite and substantive period of imprisonment. No reason for such an interpretation of the Statute is suggested. To give it such a construction would defeat the plain meaning of the words of the Act. The reason of the thing seems equally against such a construction. For example—sup-

pose the justice were to adjudge imprisonment for twelve months, or for a longer period, from the date of conviction, and impose a fine of five hundred dollars, and in default of immediate payment of the fine, to be imprisoned for twelve months from the same date: it is clear the fine would be no punishment whatever. When a term of imprisonment, as a substantive punishment, is awarded, and the offender undergoes that imprisonment, the offence is then satisfied, and from it the offender is released and discharged. When a penalty is imposed by a fine for an offence, and in default of payment, a certain period of imprisonment, unless sooner paid is imposed, and the offender undergoes the stated period of imprisonment, that is compensation, or an equivalent, for the payment of the money, and is a full and complete satisfaction and discharge of the money penalty. It logically follows, where both the penalty of imprisonment, as a substantive and separate punishment is supplemented by a money penalty for the same offence, and in default of payment, a definite period of imprisonment in lieu thereof is awarded, the undergoing of the one period of imprisonment can be no satisfaction, compensation or discharge of the other period; and where imprisonment, as a substantive punishment, is imposed, and also a fine, for the same offence, the only proper way in awarding imprisonment, in default of the payment of the fine, is to make it commence at the end of the substantive imprisonment. It is not only permissible so to do, but in truth, it can be done in no other way.

I am aware of the cases in respect of separate and distinct periods of imprisonment for separate and distinct offences, though they may be of the same nature and kind. There is a case in which the matter was considered by Mr. Adam Wilson—the Queen vs. Scott, 2 U. C. L. J. 823. It was also considered and decided as respects convictions of Justices, that cumulative sentences might be imposed, in Regina vs. Cutbush 2 L. R., Q B. 379.

In re McKinnon, 2 U. C. L. J. 324 the defendant was sentenced to imprisonment for six months, and to pay a fine of $100, and after the space of six months, and in default of the payment of the fine, for the further period of six months, unless the fine should be sooner paid. This was a conviction for an aggravated assault, where the statute, as in the present case, made the offender, on conviction, liable to imprisonment, and the payment of a fine, and in default of payment, imprisonment. Although the questions raised in that case were not decided, yet it is to be observed that neither counsel nor judge suggests on the argument, or in the disposition that was made of the case, that the justice had not the power to impose a cumulative sentence for the same identical offence. In *the case of Andrew Smith*, reported in 1 U. C. L. J. L. C. 135, I find the question of cumulative punishment distinctly brought before the Judge. The application was for the discharge of the defendant brought up under a *habeas corpus* who was convicted and imprisoned under the foreign enlistment Act. One of the objections raised, was that the prisoner was convicted and sentenced to a substantive punishment of imprisonment and also for the same offence to pay a fine and costs, and in default of payment of fine and costs, to

a further period of imprisonment *beyond* the first mentioned imprisonment. The language employed in that Act is very similar to that used in the Indian Act. It is slightly different, but is in all its essential parts relating to the matter in question, substantially the same. Hagarty, C. J., held that the warrant of commitment was not bad as to the nature or duration of the punishment, and that there was power to commit for non-payment of costs. I shall conclude what I have to say in regard to this objection by quoting a passage, bearing directly upon the point, from a very high authority, which would appear to be conclusive of the whole question.

"It must be distinctly expressed "in the warrant, whether the com- "mitment be for a certain time or "only till the payment of a fine. The "defendant ought to know for what "he is in custody, and how he may "regain his liberty. Therefore, if he "be committed for the fine, it ought "to be till he pay the fine ; *if the in-* "*tent be to punish him not only by fine* "*but by imprisonment, it ought to order* "*imprisonment for such a time, and* "*from thence also till he have paid the* "*fine.*" (Paley's summary convictious 330.) In the case before me, "the intent was to punish the defendant, not only by fine, but also by imprisonment;" and, therefore, he was ordered to imprisonment for six months, and from thence also till he should have paid the fine, for a period of not more than twelve months.

The fourth objection requires but a few observations. It is too well settled to be argued that any number of new, or corrected, or amended convictions and warrants of commitment may not be drawn up, executed and returned by the Justice, in respect of a judgment on summary conviction, provided they be truthful and honest. In this case there appears to have been but one record of conviction. Warrant No. 1, is, no doubt defective. I suppose I might, under 33 V, C. 27, sec. 2, having before me a good conviction, amend the warrant. However, warrant No. 2 was given to the gaoler before even the return day of the summons, and he was notified by the justice, through the Clerk of the Crown and Peace, to detain the defendant on that warrant instead of number one. To that warrant I see no valid objection.

I have already disposed of the exceptions taken to the warrant ofcommitment, number one, which is the fifth and last objection. I refer to R. vs. Barber, 1 East 186, Lindsay vs. Leigh 11 Q. B. 455, Massy vs. Johnson 12 East 82, Gray vs. Cookson 16 East 13, R. vs. Richards 5 Q. B. 926, Chaney vs. Payne 1 Q. B. 723, Basten vs. Carew 3 B. & C. 649, R. vs. Allan 15 East 333-347, Exparte Cross 2 H. & N. 324, R. Chaney 6 Dowl 281. Re Reynolds 1 D. & L. 846, R. vs. Tordoft 5 Q. B. 933. R. vs. Cavanagh 1 Dowl N. S. 547 ; R. vs, King 1 D. & L. 723. R. vs Fletcher 1 D. & L. 726. R. vs. Turk 10 Q. B. 540.

Upon the whole I think, the defendant committed the offence charged in the information, and, that both the conviction and the warrant number two are good, and that my summons must be discharged. Order accordingly.

JUDGMENT

—IN THE—

QUEEN VS. SCHULTZ,

MANDAMUS.

MANDAMUS.

The following judgment was on the 5th January, 1875, delivered by His Lordship Chief Justice Wood, on an application made by Mr. D. M. Walker, of counsel for defendant (Schultz) for a writ of mandamus, to issue in the perjury case of Regina *vs.* Schultz —Mr. Cornish appearing on the behalf of Piton, the private prosecutor.

IN THE QUEEN'S BENCH.

IN CHAMBERS.

Judgment of the Chief Justice in the Queen *vs.* Schultz.

In this case the information of Mr. William John Piton, of the Parish of St. Andrew's, gentleman, dated the 4th day of December, 1874, charges John Christian Schultz, of Winnipeg, Esquire, Member of the Commons of Canada for the Electoral District of Lisgar, with "having "on or about the 13th day of No- "vember, 1874, at the Parish of St. "Clement's, in the County of Lis- "gar, before Mr. Justice McKeagney, "one of the Justices of the Court of "Queen's Bench for the Province of "Manitoba, sitting in and holding a "court at St. Clement's, under the "Manitoba Act, 37 and 38 Vic., "Cap. 9, committed wilful and cor- "rupt perjury, by falsely, corruptly,

"knowingly, wilfully and maliciously "ly swearing that John Sinclair, "William Thomas, Joseph Thomas, "Roderick Stephenson, John George "Kennedy, Joseph Parisien, Charles "Stephenson, Alexander Fielding, "James Smith, James Allvian, and "George Irving, Indians of St. Peter's "reserve and residents of the Elec- "toral Division of St. Clement's, "had refunded to the Government of "the Dominion of Canada, the annu- "ities which had been paid to them "by the said Government as such "Indians; whereas in truth, and in "fact, such Indians had not refund- "ed to the said Dominion Govern- "ment their said annuities."

The prosecutor, Mr. Piton, and Mr. Cornish, his counsel, and the defendant appeared before Mr. Justice Betournay, at Winnipeg, sitting and acting as stipendiary magistrate for the Province, on the 9th day of December, 1874, the defendant having no counsel. The witnesses subpœnaed or in attendance at the instance of the prosecutor, were the prosecutor, Thos. Sinclair, John Sinclair, J. A. N. Provencher, and Mr. Justice McKeagney. Of these only three were present at the Court of Revision in St. Clements, and they only of the prosecutor's witnesses could speak of what then transpired—the real controversy being what actually did take place on that occasion and before that court and judge, in reference to the right of the Indians mentioned to be enfranchised. The other witnesses attending at the instance of the prosecutor were called to prove, what was not denied, that these Indians had not returned their annuity money. They were not present at St. Clement's, and therefore knew nothing of the occurrence before the judge at that place. There were also present before the judge sitting, as stipendiary magistrate, attending at the instance of the defendant, William Peel, John Gunn, John Keplin, and Walter R. Bown, who were, with the exception of Bown and Gunn, present at the time the alleged offence was committed, and knew all the facts and circumstances of the case; and Bown and Gunn were present a part of the time and could swear to certain of the facts and circumstances of the case, and could give material evidence affecting the respective statements under oath of Piton and Thomas Sinclair by way of explanation and contradiction. The judge, as stipendiary magistrate, took the evidence of Piton, John Sinclair, J. A. N. Provencher and partly that of Thomas Sinclair, and adjourned the further hearing of the case till the 11th of the same December, and at the adjourned hearing, the examination and cross-examination of Thomas Sinclair were completed. At the conclusion of his testimony, Mr. Cornish, counsel for the prosecution, stated that the case for the prosecution was closed; and thereupon the defendant remarked: "There is the witness, Mr. Justice "McKeagney, the justice before "whom the alleged offence was com- "mitted, subpœnaed by the prosecut- "or and in attendance here ready to "be examined, but who has not been "called by the prosecution. He is "an important and material witness "in respect of the facts and circum- "stances of this charge, and I espe- "cially desire to have him called and "examined. And I have in attend- "ance other important and material "witnesses who know the facts and "circumstances of the case, and whom "I desire to have called and examin- "ed," or words to the foregoing ef-

fect; to which the stipendiary magistrate replied, "I am sorry, but I "have no power to call and examine "the witness (referring to Mr. Jus- "tice McKeagney) inasmuch as the "prosecutor has not seen fit to call "him, and I have no power to exam- "ine witnesses for the defence," or words to that effect. The Justice then asked the defendant if he wished to make any statement, cautioning him as required by the statute in that behalf, and thereupon the defendant made the following statement: "I state first that I took no "oath at St. Clement's Electoral "Court. That I am in a position "here to-day to prove on the evi- "dence of the judge of that court, "that I took no oath at the last "Electoral Court of St. Clement's. "That I am in a position to-day to "support his testimony to that effect "by four other competent witness- "es. I am able to prove also by the "judge of that court that no oath "was administered to me by the "judge of that court, because no ob- "jection had been made to those vot- "ers being put on the list."

Notwithstanding the statement, the justice still refused to hear any further evidence as to the facts and circumstances of the case, thinking he had no power to do so, as the prosecutor declined to call or did not call any further witnesses; and he also refused to *exercise*, or, as appears from the affidavit of the defendant and papers *did not exercise any discretion* as to whether or not it would conduce to, or frustrate or embarrass the ends of justice to permit to be called and examined on behalf of the defendant those presons then ready in court to give evidence of the facts and circumstances of the case, and in explanation and in contradiction of the statements respectively made by Piton and Thomas Sinclair, the two only material witnesses for the prosecution, *on the ground that he had no authority or power to exercise such discretion;* and thereupon the justice made an order, holding the defendant to bail to take his trial on the charge at the next sitting of the Court of Queen's Bench, sitting as a court of Oyer and Terminer and general gaol delivery and of Assize and Nisi Prius, at Winnipeg.

The defendant seeks in this application to set aside the order of the stipendiary magistrate, and asks for a writ of mandamus, commanding the magistrate to hear the witnesses produced before him, who know the facts and circumstances of the case, whether the testimony of such witnesses tend to establish the guilt or innocence of the defendant, and also commanding the magistrate to exercise his discretion as to whether or not it would tend to the discovery of truth and the advancement of public justice to hear witnesses produced *expressly as witnesses for the defendant* to explain, or contradict, or displace the evidence given in support of the charge.

The determination of the question raised by this application involves to so large an extent the rights and liberty of the subject, and the welfare of society in general, deeply interested as it is in the proper and thorough administration of public justice, that I must be pardoned for a somewhat exhaustive examination of the whole subject.

The office of the Justice of the Peace dates back to an early period in the history of our jurisprudence. Sir Henry Spelman says it was created by Edward the Third, A.D., 1327. It appears, however, on good author-

ity, that, prior to the time of Edward the Third, the preservation of the peace, was, by the common law, entrusted to certain officers under the technical appellation of *custodes* or *conservatores pacis*; of whom some had this power by virtue of their office, as the Lord Chancellor, and other judges and great officers of State; and the judges of the superior courts are still justices, conservators of the peace within the jurisdiction of their courts. Others were such by prescription—but the more numerous were those who were chosen by the freeholders in full County Court before the Sheriff from *probioribus potentioribus comitatus sui in custodes pacis*, in the same manner as those ancient common law officers, the coroners, are elected in England at the present day. The class of persons who were formerly entitled to act as conservators of the peace *virtute officii*, for the most part still remain so; but the others have been superseded by the more modern officers denominated "*justices of the peace.*"

Whatever may have been the period of the original institution, the first statutory provision to be found relating to this office was made in the first year of the reign of Edward the Third; when it was ordained that justices of the peace should be assigned by the King's commission; and their powers which at first were very limited were gradually extended in succeeding reigns of succeeding Sovereigns as the necessities of the times and the great utility of the office prompted; and so numerous and important were the duties imposed upon them, as early as the time of Blackstone, we hear that learned commentator lamenting that few care to undertake, and fewer understood the duties of the office; and he adds—"They were of such "vast importance to the public as to "make the country greatly obliged "to any worthy magistrate who "without sinister views of his own "would engage in the troublesome "service." Since the time of Blackstone the powers and duties of this office have been extensively enlarged and greatly increased, the proper execution and discharge of which require talent, training and matured habits of business, with at least a general knowledge of the common and statutory law of the land.

It may not be amiss here to premise that in all the varied and almost infinite duties of justices of the peace their authority is either *ministerial* or *judicial*. They are said to act *ministerially* in cases of felony or misdemeanor, in which they merely initiate the proceedings upon prosecutions, by receiving or taking an information of the offence, and by warrant or summons, bringing the offender before them, and in his presence taking the depositions of the witnesses who know the facts and circumstances of the case, and committing or holding to bail for trial, or altogether discharging the accused; and in some other cases of minor importance, when specific acts are positively directed to be done by statute —although it must be admitted that in the class of cases first mentioned the duty imposed is both *ministerial* and *judicial*; ministerial in the receiving of the informations and the taking of the depositions and the examination of the accused, but *judicial* in determining whether or not the evidence given, as well that for as against the accused, viewed altogether, raise such a probable and reasonable presumption of guilt as should

put the party upon his trial, or so completely establish his innocence as to justify his discharge. Justices act *judicially* in all matters in which they have summary jurisdiction; and at the present day justices have been given summary jurisdiction over an almost endless variety of cases, partaking some of a criminal and some of a civil nature, and others partly criminal and partly civil. In all these, the justice not only takes the evidence, but he is made the judge both of the law and the fact, and passes judgment—that is, he makes a conviction or order, and in so far as he is concerned, finally disposes of the case.

In the exercise of the authority conferred upon these Justices of the Peace, they in many cases act gratuitously and devote much time in the administration of many branches of the law, and among others, in most of the initiatory, and in some of the maturer stages of our criminal jurisprudence, confer incalculable benefits upon society and deserve the cordial support of the whole community. Peace and good order among the people and security and protection of life and property largely depend upon the magistracy of the country. They are often called upon to act in matters of considerable difficulty and great delicacy, where prominent and influential persons are concerned; and if they do not so conduct the proceedings, or so adjudicate as on a full, deliberate, and mature consideration of all the facts and circumstances may turn out to be strictly correct, yet, if they act *honestly*, although in *error or mistake*, the law always has, and I hope always will, protect them. In such a case, either to censure or punish those to whom the country owes so much, and who, gratuitously, are honestly endeavoring faithfully to discharge a public trust, may be congenial to the despotic rule of an enslaved people, but is wholly abhorrent from the jurisprudence of England. My present purpose is not to review the responsible position occupied by the magistracy of the present day in the administration of the laws and the multiplied duties devolved upon that office by Parliament, through numerous legislative enactments, extending over a period of upwards of three hundred years, however interesting such a discussion might be.

In determining the question involved in this application, I shall confine myself to the consideration of the duty of Justices of the Peace relative to the preliminary investigations before them of persons charged with or suspected of misdemeanors or felonies.

It may be remarked as one of the axioms of our law, that no one can be deprived of his liberty without due process of law. As a rule, admitting of but few exceptions, before any one can be arrested, or even summoned on a criminal or *quasi* criminal charge, there must be a formal information taken under oath by a justice of the peace, or an indictment found by the Grand Jury on sworn testimony in the first instance and without the intervention of the usual preliminary proceedings before a Justice of the Peace. As the personal liberty of every individual of the community is subject to the same rule of law, and as nearly all criminal charges have their initiation with Justices of the Peace, who, on examination of the witnesses who can speak of the facts and circumstances of the offence, are empowered to commit to gaol or to admit to bail for

trial, it is of the very greatest importance clearly to understand and know what, in this respect, is the course and duty of the Justice, and what are the rights and privileges of the accused.

At one time, and for many years, persons charged with *felonies* were not permitted, even on their final trial, to produce and have examined; witnesses under oath on their behalf. This was an ancient and commonly received practice, derived from the civil law, and which to this day obtains in France and many of the continental nations of Europe. The first inroad on this practice was made by Queen Mary the First. When she appointed Sir William Morgan Chief Justice of the Common Pleas, she enjoined him, "That notwithstanding the old error which did not admit any witness to speak, or any other matter to be heard in favor of the adversary, Her Majesty being party; Her Highness's pleasure was that whatsoever could be brought in favor of the subject should be admitted to be heard; and, moreover, that the Justices should not persuade themselves to sit in judgment otherwise for Her Highness than for her subjects."

Afterwards, in one particular instance (when embezzling the Queen's military stores was made felony by Statute, 31 Eliz. c. 4) it was provided that any person *impeached* for such felony,

"Should be received and admitted to make any lawful proof that he could, by lawful witness or otherwise, for his *discharge* or *defence*:" and at length the courts grew so heartily ashamed of a doctrine so unreasonable and oppressive that a practice was gradually introduced of generally, in all cases of felony, examining witnesses for the prisoner, but not under oath; the consequence of which still was that the jury gave less credit to the prisoner's evidence than to that produced by the Crown. Sir Edward Coke protested very strongly against the tyrannical practice, and declared that —"he had never read in any act of "Parliament, book-case, or record, "that in criminal cases the party accused should not have witnesses "sworn for him; and there was not "so much as *scintilla juris* against "it."

And Sir William Blackstone observes—"The House of Commons "were so sensible of this absurdity "that, in the bill for abolishing hostilities between England and Scotland (Statute 4, Jac. 1, c. 1) when "felonies committed by Englishmen in Scotland were ordered to "be tried in one of the three northern counties, they insisted on a "clause, and carried it against the "efforts both of the Crown and the "House of Lords, against the practice of the courts in England and "the express law of Scotland, 'that "in all such trials for the discovery "of truth and the better information "of the consciences of the jury and "the justices, there shall be allowed "to the party arraigned the benefit "of such credible witnesses to be examined upon oath as can be produced for his clearing and justification."

Subsequently (Statute 7 Wm. 3, c. 3) the same measure of Justice was established throughout the realm, in cases of treason, and it was afterwards declared and enacted (1 Ann. St. 2, c. 9, sec. 3)—"that from and after the 12th day of February "1702, all and every person and "persons who shall be *produced* or

"*appear* as a witness or witnesses *on* "*behalf of the prisoner* upon any trial "for *treason* or *felony*, before he or "she be admitted to dispose or give "any manner of evidence, shall "take an oath to depose the truth and "nothing but the truth, in such man- "ner as the witnesses of the Queen are "by law obliged to do; and if convicted "of any wilful perjury in such evi- "dence, shall suffer all the punish- "ments, penalties, forfeitures and "disabilities which by any of the "laws and statutes of this realm are "and may be inflicted upon persons "guilty of wilful perjury."

From the passing of this Act to the present time, it has been the practice in England, on trials of all felonies, to give the same facilities to the admission of the evidence on oath for the prisoner as those against him; and from an examination of the reported cases and the uniform authority of all text writers on the subject, the same course has been pursued by the most learned and the most experienced justices of the peace in the initiatory and preliminary inquiry into all felonies.

On trials for misdemeanors it has always been the practice to permit the defendant to produce and examine any and all witnesses under oath; and in these cases the practice of permitting the defendant to examine his witnesses under oath on the preliminary investigation, seems to be sanctioned both by reason and authority.

It may not be inappropriate to remark that the prisoner in all cases has, and at all times had, a right to address the jury in his defence. In misdemeanors the defendant always was, and still is, allowed to do this by counsel. In high treason the prisoner was first allowed to defend himself by counsel, by statute (7 and 8, W. 3, c. 3. sec. 1) and afterwards (6 and 7, W. 4. c. 114, sec. 1) it was provided and enacted that—"all per- "sons tried for felonies shall be ad- "mitted after the close of the case "for the prosecution to make full an- "swer and defence thereto by counsel "learned in the law, or by attorney "in courts where attornies practice "as counsel.

If, however, the prisoner or the defendant wishes to address the jury himself, and to examine and cross-examine witnesses, he will, of course, be allowed to do so, and his counsel will in such a case, if desired, be allowed to argue points of law that may arise in the course of the trial, and to suggest questions to him for the examination and cross-examination of witnesses. But he cannot of right have counsel to examine and cross-examine witnesses and reserve to himself the address to the jury: although in most cases at the present day, if specially asked for, the judge would permit it. It has therefore only been since 1836 that persons charged with felonies, at every stage of the proceedings against them, have had the right to appear and make full defence by counsel learned in the law—a fact which is strangely incongruous with that humanity, equity and fair play, which are the distinguishing characteristics of English jurisprudence from an early period in the history of our country.

Without adverting to any of the older statutes, I will refer to 7, George 4. c. 64, passed in 1826, and which contains substantially the provisions of the Imperial Act, 11 and 12 V. c. 42, passed in 1848, and the Canadian Act 32 and 33 V., c. 30, passed in 1869—intituled—"*An Act* "*respecting the duties of justices of the*

"*peace out of sessions in relation to* "*persons charged with indictable of-* "*fences,*" which is substantially a copy of the latter statutes. The only portion necessary to refer in this connection are sec. 1, 2 and 3, c. 64, 7 George 4, sec. 17 and 25. c. 42; Imperial Act, 11 and 12 V. and the corresponding sections in the Canadian Act, 29 and 56, c. 30, 32 and 33 V. which the latter sections in so far as they relate to the preliminary investigation in charges of indictable offences, are exact copies of the Imperial Act, sec. 17 and 25, c. 42, 11 and 12 V. in so far as these latter sections relate to the same subject.

Sec. 1, c. 64, 7 George 4, provides,

" That where any person shall be "taken on a charge of felony or sus- "picion of felony before one or more "Justices of the Peace, and the char- " ges shall be supported by positive " and credible evidence of the facts, " or by such evidence as, if not *ex-* " *plained* or *contradicted,* shall, in " the opinion of the Justice or Jus- " tices, raise a strong presumption " of guilt of the person charged, " such person shall be committed to " prison by such Justice or Justices in " the manner hereinafter mentioned; " but if there shall be only one Jus- " tice present, and the *whole evidence* " given before him shall be such as " neither to raise a strong presum- " tion of guilt, nor to warrant the dis- " missal of the charge, such Justice " shall order the person charged to be " detained in custody until he or she " shall be taken before two Justices " at the least: and where any person " so taken or any person in the first " instance taken before, two Justices " of the Peace shall be charged with " felony or suspicion of felony, and " the evidence given in support of " the charge shall, in their opinion, " not be such as to raise a strong " presumption of the guilt of " the person charged, and to " require his or her committal, or " *such evidence shall he adduced on be-* " *half of the person charged* as shall, " in their opinion, weaken the pre- " sumption of his or her guilt, but " notwithstanding, appear to them, " in either of such cases, to be suffi- " cient ground for judicial inquiry " into his or her guilt, the person " charged shall be admitted to bail " by two such Justices in the man- " ner hereinafter mentioned; pro- " vided always that nothing herein " contained shall be construed to re- " quire such Justice or Justices to " hear evidence on behalf of any " person so charged as aforesaid, un- " less it shall appear to him or to " them to be meet and conducive to " the ends of justice to hear the " same."

Section 2 provides that before any person charged with felony shall be bailed or committed, the Justices shall take down in writing the depositions of the witnesses *who shall know the facts and circumstances of the case,* and bind them to appear at the trial, and deliver the same to the proper officer of the court.

Section 3 makes the same provisions with regard to misdemeanors as are made in respect of felonies.

Sections 29 and 56 of the Canadian Act of 1869, and those parts of the Imperial statute of 1848 relating to the matter in question are as follows:—

"In all cases when any person ap- " pears or is brought before any " Justice or Justices of the Peace " charged with any indictable of- " fence, whether committed in Can- " ada or upon the high seas, or on

'land beyond the sea, or whether 'such person appears voluntarily 'on summons or has been apprehended with or without warrant, 'or is in custody for the same or 'any other offence, such Justice or 'Justices, before he or they commit such accused person to prison 'for trial, or before he or they admit him to bail, shall in the presence of the accused person (who 'shall be at liberty to put questions 'to any witness produced against 'him) take the statement (M) *on oath or affirmation of those who know the facts and circumstances of the case*, and shall put the same in 'writing, and such depositions shall 'be read over to and signed respectively by the witnesses so examined, and shall be signed also by the 'Justice or Justices taking the 'same."

"When all the evidence offered 'upon the part of the prosecution 'against the accused party has been 'heard, if the Justice or Justices 'of the Peace then present are of 'opinion that it is not sufficient to 'put the accused party upon his 'trial for any indictable offence, 'such Justice or Justices shall forthwith order the accused party, if in 'custody, to be discharged as to 'the information then under inquiry; 'but if in the opinion of such Justice or Justices, the evidence is 'sufficient to put the accused party upon his trial for an indictable offence, although it may not raise 'such a strong presumption of guilt 'as would induce them to commit 'the accused for trial without bail, 'or if the offence of which the party 'is accused is a misdemeanor, then 'the Justices shall admit the party 'to bail as hereinbefore provided: 'but if the offence be a felony and 'the evidence given is such as to 'raise a strong presumption of guilt, 'then the Justice or Justices shall 'by his or their warrant commit 'him."

* * * * *

Under 7 George 4, c. 64, there can be no question that Justices of the Peace were by law *required* to take the depositions of *those who knew the facts and circumstances of the case*, whether their evidence tended to the guilt or innocence of the party accused, by whomsoever produced, and also the depositions of witnesses expressly called by and on behalf of the accused party to *explain* or *contradict* the evidence produced against him—provided it should appear meet and conducive to the ends of justice so to do. To examine and take the depositions of *those who knew the facts and circumstances of the case* was *imperative*; and with respect to the examination of all such witnesses, justices had no discretion. If they failed or refused, on any charge of felony or misdemeanor, to take this examination in the case of *any* witness *who knew the facts and circumstances of the case*, and who should appear before them on the inquiry, whether his evidence would make for or against the party accused, they would have committed a manifest breach of the statute, and, being a *purely ministerial* duty might be compelled to correct the error; and this course, as I shall have occasion presently to show, would be demanded both in the interest of the administration of public justice and of the rights and liberty of the individual subject. But where the *manner* of the performance of any duty imposed on Justices of the Peace, as under this statute, the hearing of witnesses called as such for and on behalf of the accused par-

ty, and the coming to the conclusion or judgment, on a consideration of all the evidence, either to discharge, hold to bail, or commit, are left absolutely in their discretion and judgment, and being discretionary and *judicial* acts, this court will not review the grounds of the exercise of their discretion nor the reasonableness or propriety of the conclusion or judgment at which they have arrived; nor will it in such cases intervene by *mandamus*. The provisions of the statute of 7 George 4, c. 64, relative to the matter in question remained in force from 1826 to 1848, when the Imperial Act 11 and 12 V., c. 42, was passed. As the provisions of the last mentioned Act are in substance the same as those in the former, in so far as they relate to witnesses who may be examined on oath before Justices on charges of indictable offences, it becomes important to know what the authorities say on this subject during the time the former Act was in operation and since its repeal and the substitution therefor of the last mentioned statute, which, in this respect, is the same as the Canadian Act, 32 and 33 V., c. 30.

Dalton, in his justly celebrated work on Justices of the Peace, in speaking of the preliminary investigation on charges of felony, says, now more than a century ago :—

"It seemeth also just and right "that the Justices who take informa- "tion against a felon, or person sus- "pected of felony, should take and "certify as well such information, "proof and evidence as goeth to the "acquittal or clearing of the prison- "er as such as makes against the "prisoner; for such information, "evidence or proof so taken is only "to inform the King and his justices "of gaol delivery of the truth of the "matter."

(Dalt. c. 165.)

One of the objects of the legislature in passing the statute (7 George 4, c. 64,) was to enable the judge and jury before whom the prisoner is tried to see whether the witnesses at the trial, as well for as against the prisoner, are consistent with the account given by them before the committing magistrate—a thing which could not be done, in the case of the witnesses for the prisoner, unless their depositions are taken down and certified to the court. (Lamb's case 2, Leach 552). In the 2nd London and the 4th American Ed. of Chitty's elaborate work on criminal law, published in 1841, at 77 (old paging) it is laid down that—"the magistrate "having authority to examine the "*party bringing the offender*, which ex- "pression is construed to include as "well the accuser, as also all the wit- "nesses in support of the charge, as "incident to this authority, has pow- "er to bring before him all persons "who appear upon the oath of the "informer, or *who may occur to the* "*magistrate himself*, to be material "witnesses for the prosecution ; and "for this purpose may issue his war- "rant to a constable requiring him "to cause the witness to appear be- "fore the magistrate and give evi- "dence. And it should seem that if "the witness refuses to attend, he "may be brought by the officer be- "fore the magistrate, who also has "power to bind him over to give evi- "dence or to commit him in case of "its refusal. And it should seem "that upon the reasonable request of "the defendant the magistrate has "a similar power to bring before him "any witnesses who may be able to "give material evidence in his be- "half."

And again at p. 80 it is stated that it is very desirable and important that the whole statements of the witnesses in all their circumstances and bearings should be taken down and certified—"in order that the witnesses may be tied down to their first narration and not left open to the influence of those impressions either of pity or of revenge, which may affect them during the interval. And though the words of the statute (7 George 4, c. 64,) seem to include of necessity only the testimony adduced in support of the charge, the Justice ought to take and certify as well the information, *proof and evidence which tend in favor of the prisoner as those which are brought forward against him.* And though formerly his witnesses could not be examined on oath, they are now placed on a footing with those whom the prosecutor adduces."

And at page 89 it is stated that—"in modern practice, *though exculpatory evidence is received at the instance of the prisoner and certified with the other depositions,* unless it appear in the clearest manner, that the charge is malicious as well as groundless, it is not usual for the magistrate to discharge him even when he believes him to be altogether innocent."

But to justify such a course under such circumstances there must be an *express charge of the offence against the accused, directly sworn to by at least one credible witness.* I will refer to one other authority, recognized as of the very greatest weight on all matters relating to the practice of Justices of the Peace. Burn's Jastice, 25th London edition, published in 1830, vol. 1, page 998, in commenting on 7 George 4, cap. 64, declares that it was the duty of the Justice to take down in writing and certify, as well the evidence which might tend to establish the *innocence* as the *guilt* of the party accused: and Dalt. c. 165 and Lambe's case, 2 Leech 552 are cited as correctly laying down the law and practice governing Justices in these preliminary inquiries. I do not say there may not be some authorities the other way; but if so, I have been unable to find them. All the great writers on the criminal law of England are unanimous in holding that at the passing, and during the continuance, of 7 George 4, cap. 64, that is from 1826 to 1848, the law and practice of Justices was to take down in writing and certify the depositions, not only of all those witnesses who knew the facts and circumstances of the case by whomsoever produced, but also of all those witnesses who were called and produced expressly as witnesses for the accused party, if any such were offered, to contradict the testimony of the first mentioned witnesses, or to prove other and independent facts and circumstances, which, if true, would displace the case made for the Crown.

I will now proceed to examine the authorities as to the law and practice of Justices under 11 and 12 Vic., chap. 42, secs. 17 and 25, which came into operation on the second day of October, 1848, and having ascertained what they have been held to be under this Act, it will follow that such is the law and such should be the practice under the Canadian statute, 32 and 33 Vic., cap. 30, secs. 29 and 56.

In the fourteenth London and seventh American edition of Archbold's criminal procedure, pleading and evidence, in indictable cases, published

in 1860, under the head of "The Examination and Commitment," under the Imperial Act 11 and 12 Vic., cap. 42, I find amongst others the following notes on the text: —

"If the party accused decline to "make any defence the magistrate "proceed to commit him."

"After the examination of the "prisoner is completed his witnesses, "if he have any, must be sworn and "and examined; and he may have "the assistance of counsel in such "examination."

"The magistrate is not to take "merely the testimony adduced in "support of the charge, but he ought "also to return the evidence which "tends in favor of the prisoner."

"When the magistrate is satisfied "upon the examination and on a "consideration of all the evidence "*on both sides* that the accused is "guilty of the offence charged, or "that there is probable cause of suspicion against him, it is his duty to "commit him that he may answer "the charge at the proper court; "unless in a bailable case, sufficient "bail be given."

"To authorize a commitment, the "same proof is not required which "would be necessary to convict a "person on the trial in chief, but the "committing magistrate will require "that probable cause be shown. "Probable cause is a case made out "by proof, furnishing good reason "to believe that the crime alleged "has been committed by the person "charged. When such cause is "shown it can be removed only by "its appearing that no such crime "has been committed, or that the "suspicion entertained is wholly "groundless."

"Upon this examination or primary hearing the magistrate is required to act judicially in the exercise of his understanding and judgment, with a proper consideration of all the evidence adduced in such examination and of the law relative to the case. To the extent of forming a judgment on the inquiry the magistrate is the judge of the law and the facts."

The same doctrine is laid down in the treatise of this learned author, published in 1853.

In the tenth English and fourth American edition of Phillips on evidence, published in 1859, under the title of "Admissibility of depositions in Criminal Cases," it is laid down that:

"It is the duty of the Justices to return the depositions of any witnesses who may have been examined though not bound over to prosecute. There appears to be some doubt whether it is the duty of the Justices to return the depositions of witnesses who may have been called on the part of the accused; or whether in fact they have power to do so. The language of 7 George IV, cap. 64, which gave power of bailing prisoners obviously contemplated that the evidence on the part of the prosecution might be explained or contradicted by evidence on behalf of the accused; although the Justices are not *required* to hear evidence on behalf of the accused unless they shall consider it 'meet and conducive to the ends of justice to hear the same.' The corresponding section of the 11 and 12 Vic., cap. 42, is entirely silent in respect to evidence before the Justice on behalf of the accused."

"It will be observed that nothing is said in 7 George 4 about returning the depositions of the witnesses who may have been examined for

" the accused, but it seems to have " been considered that it would be " highly expedient if not the duty of " the magistrate to do so. (Re Ful- " ler 7 C. & P. 269, 2 Russ., Cr. & " M. by Greaves 900)."

" This opinion has been enforced " since the passing of 11 and 12 " Vic., cap. 42, by Lord Denman, " C. J., who in his charge to the " grand jury at the Taunton Spring " Assizes, 1849, observed that he " would recommend in all cases in " which a party charged with felony "(the reason would apply with great- " er force to a misdemeanor) had " his witnesses, and those witnesses " were in attendance at the time of the " examination before the magistrate, " that he should hear the evidence " of such witnesses as the accused on " being asked wished to be examined " in his defence; suggesting that, " if the witnesses for the accused " should explain the facts that were " proved against him, so as to re- " move all suspicions of guilt, and " were believed, they would actually " have made out a defence on behalf " of the accused, and there would be " no necessity for any further pro- " ceedings; but if the witnesses so- " called only contradicted those for the " prosecution in material points, " then the case would be properly " sent to a jury to ascertain the " truth of the statements of each " party; and that the depositions of " the witness being taken and signed " by them, should be transmitted to " the judge together with the depo- " sitions in support of the charge."

" It seems, therefore, to be the better " opinion, that witnesses for the ac- " accused, present before the magis- " trate, should be heard if he wishes " it; and that their depositions " should be returned with those of " the witnesses for the prosecution, " although such a course is not re- " quired by the statute. It has the " appearance of harshness to reject " witnesses who are present and " ready to be examined for the ac- " cused: it is in some respects also " for the interests of justice that " their depositions should be re- " turned; for it is of some conse- " quence that the judge at the trial " should see whether the witnesses " are consistent in their statements, " with the view to prevent a defence " being set up at the trial, entirely " different, perhaps, from what may "have been relied upon before the mag- " istrate; and also to give those who " have the charge of the prosecution " an opportunity of inquiring into " the credit of the witnesses for the " defence, and into the truth of their " evidence."

The learned author then discusses the admissibility on the trial of the prisoner of the depositions of the witnesses for the prisoner, taken and returned in due form of law, in the event of the death or permanent disability of such witnesses, and concludes that it is doubtful if they would be admitted in evidence. This doubt is, however, now removed in England by 30 and 31 Vic., cap. 35, which places the witnesses for the accused in all respects on the same footing as the witnesses for the prosecution.

Stone's Petty Sessions, seventh edition, published in 1863, four years after the edition of "Philips on Evidence," from which I have made the foregoing citations, puts the matter in a much clearer light, the learned editors having had the advantage of consulting the decisions and observing the practice under the Act for four years after the publication of

the latter work. At page 258 it is stated:—

"If the prisoner be desirous of "calling witnesses for his defence at "this stage of the proceedings, (that "is after having been cautioned and "after he has made his statement, "and the same has been taken down "and signed as required by the Act) "which it is imprudent for him to do "unless he has strong grounds for "believing that he can satisfy the "Justices of his innocence, and thus "procure his discharge, or at all "events an admission to bail, he is "at liberty to call as many witnesses "as he pleases, and they must be "sworn and examined, and their de-"positions taken down in writing in "the same manner as those for the "prosecution; and the prosecutor "may cross-examine such witnesses "respectively, as soon as their evi-"dence in chief is finished.

But whatever doubts existed on this subject would seem to be entirely removed by the following observations in the last English edition of "Russell on Crimes," published in 1865:—

"It is highly expedient in the fur-"therance of the ends of justice, "that whenever prisoners offer to "produce witnesses before the ma-"gistrate in answer to the charge "made against them, such wit-"nesses should be regularly examin-"ed on oath and their statements "taken down in writing, and return-"ed with the depositions. Whether "the evidence so adduced be true or "false, it is very important that it "should be received and taken down. "If it be true, it may be so clear, "positive, and distinct, as to explain "or contradict the evidence adduced "in support of the charge, in such a "manner as to completely satisfy "the magistrate that it is not suffi-"cient to put such accused party on "his trial, in which case he ought to "be discharged; or the evidence ad-"duced on behalf of the party charg-"ed may, in the opinion of the ma-"gistrate, weaken the presumption "of the party's guilt, but the evi-"dence may, notwithstanding, be "sufficient to put the accused party "on his trial, in which case the ma-"gistrate may admit the prisoner to "bail. And even if the evidence so "adduced should not produce either "of these results, still it is impor-"tant, for the sake of the prisoner, "that the witnesses should be exam-"ined, and their depositions return-"ed, as he is thereby freed from the "suggestion often made at the trial, "that the case endeavored to be "proven before the jury has been "concocted since the examination "before the magistrate; and if, as "has been suggested, the deposition "of a witness examined on behalf "of a prisoner before the magistrate, "would be admissible in evidence "for the prisoner on his trial, in case "of the death of such witness, it is "but reasonable that the prisoner "should have the depositions of his "witnesses taken in order to be used "in case of such an event. On the "other hand, if the evidence adduced "be false, it is essential for the ends "of justice that it should be "heard and taken down, in order "that the prosecutor may have the "means before the trial of investi-"gating the facts deposed to, and "the opportunity of testing the state-"ments of the witnesses by compar-"ing those made on the trial with "those made before the magistrate; "and, moreover, the taking the de-"positions would serve as a check "upon the prisoner against setting

" up a different defence on the trial, " and upon the witnesses against im- " proving their tale between the time " of their examination before the " magistrate and the trial." (3 Russell on Crimes—last English edition, page 490—see cases there cited and notes of the editor.)

From what has already been said, it would appear both from reason and authority, that, as the law and practice stood under the Imperial Act 11 and 12 Vict., c. 42, and as it now stands under the Canadian Act, 32 and 33 V., c. 30, it is not only the duty of the Justice to hear *those witnesses who know the facts and circumstances of the case,* whether brought before him by the prosecutor, or at his own instance, or that of some one else, which he is *imperatively required* to do by the positive direction of the statute, but it is also equally his duty to examine those witnesses produced before him *expressly as witnesses for the prisoner*, unless he should see clearly that to do so would have a tendency to frustrate the ends of justice. This is the position taken by every criminal authority within my reach, and, I think, must be considered to be the law and the practice at the present day. To hold otherwise would place the liberty and character of every person in the community at the mercy, not of the magistrate, but of every corrupt, infamous, and malicious individual who might, to gratify revenge, hatred or malice, make oath that an indictable offence had been committed by the person whom he chooses to accuse, a doctrine too monstrous to be stated as law.

It has been said that Parliament by the passing of the Imperial Act 30 and 31 V., c. 35, assumed that the law and practice, as I have stated them, did not exist prior to and at the date of that enactment. I think quite the contrary is the reasonable conclusion to be drawn from an attentive perusal of that Act.

The Act is intituled, "*An Act to remove some defects in the Administration of the criminal law.*" The first and second sections have no relation to the present subject. The only sections in the Act material and pertinent to this inquiry are the third and the fourth, the preamble to which is as follows :—

"And whereas complaint is fre- " quently made by persons charged " with indictable offences, upon their " trial, that they are unable by reason " of poverty to call witnesses on their " behalf, and that injustice is there- " by occasioned to them ; and it is " expedient to remove as far as prac- " ticable all just ground for such " complaint.

It then provides,—" that in all " cases where any person shall appear " or be brought before a Justice of " the Peace charged with any indict- " able offence, before such Justice " shall commit or hold to bail for " trial such accused person, he shall " immediately after obeying the di- " rections of 11 and 12 V., c. 42, " sec. 18, *demand* and *require* of the " accused person whether he desires " to call any witness; and if the ac- " cused person shall, in answer to " such demand, call or desire to call " any witness or witnesses, such Jus- " tice, in the presence of the accused " person, shall take the statement on " oath, both examination and cross- " examination, of those who shall be " so called as witnesses by such ac- " cused person, and who shall know " anything relating to the facts and " circumstances of the case, or any- " thing tending to prove the inno-

" cence of such accused person, and " shall put the same into writing, " and each deposition of such wit- " nesses shall be read over to and " signed respectively by the witnesses " who shall have been so examined, " and shall be signed also by the Jus- " tice taking the same, and transmit- " ted in due course of law with the " depositions; and such witnesses, " not being witnesses merely to the " character of the accused, as shall in " the opinion of the Justice give evi- " dence in any way material to the " case, or tending to prove the inno- " cence of the accused person, shall " be bound by recognizance to ap- " pear and give evidence at the said " trial; and afterwards, upon the " trial of such accused person, all " the laws now in force relating to " the depositions of witnesses for the " prosecution shall extend and be ap- " plicable to the depositions of wit- " nesses thereby directed to be " taken."

Section four provides that—"All " the provisions of 11 and 12 V., c. " 42, relating to the summoning and " enforcing the attendance and com- " mittal of witnesses and binding " them by recognizance and com- " mittal in default, and for giving the " accused person copies of the exam- " inations, and giving jurisdiction to " certain persons to act alone, shall " be read and shall have operation " as part of this Act."

By observing the terms of the preamble and the words of the enacting clauses, it may fairly be gathered that these sections are declaratory of what the law and practice then was, and make provision for fully giving effect to that law and practice, by compelling the attendance of witnesses for the accused both before the justice at the trial, and by giving to the depositions the same effect, and to the justice the same power and authority over *his* witnesses, as had been given to him by the prior Act in respect of the depositions and witnesses for the Crown.

I may state a few general rules by which a justice should be guided in the preliminary investigation of an indictable offence, where the accused does not consent to be tried summarily:

1. At the opening of the examination he need never ask the person charged whether "*he is guilty or not guilty;*" but he should read over to him the information and explain to him the nature of the charge, and inform him that at the conclusion of the evidence-in-chief of each witness, he will be at liberty to ask the witness any questions he likes; and he should then proceed to the examination of all those who know the facts and circumstances of the case, and take down the sworn statement of each witness in the first person in the very words, as nearly as possible, of the witness; but confining the witness to the rules of evidence, as on a trial, while permitting him to make his own statement in his own way; for the proceeding is not a *trial* but an *inquiry:* and after the witness has made his full and free statement, and after the justice has asked and taken the answer down of every question which he thinks can have any possible bearing upon the case, he should read over the deposition to the witness, directing the accused to pay particular attention to it, and telling the witness to observe it carefully, and as he is reading it to stop him and make any corrections he desires. After this is done, and all corrections made, the justice should tell the accused that he is at liberty to

put to the witness any questions he likes, and that the answers of the witness will be taken down—and the justice should aid and assist the accused in putting his questions. When the cross-examination is closed, it should be read over and corrected, if necessary, and when all is finished the deposition should be signed by the witness and the justice. Too great care cannot be taken in respect of these depositions, since now they may, in given cases, be admitted as evidence on the trial. In this manner every witness who knows, or who on the investigation the justice shall find out knows, anything about the case, should be examined, until the inquiry is thoroughly exhausted.

2. After the justice has examined all those who have appeared or have been brought before him, and those for whom he may have sent, being suggested, or occurring to him during the progress of the proceedings, as being material witnesses as to the facts and circumstances of the charge, or to the identity of the person accused, or to his complicity with the offence, and after he has obeyed and complied with the directions contained in the thirty-first and thirty-second sections of the Canadian Act of thirty-two and thirty-three Victoria, chapter thirty, he should demand and require of the person accused whether he desires to call any witnesses, and if so, and they are absent, he should send for them by subpœna, and should then proceed and examine under oath and take down the depositions of all witnesses for the accused in the same manner as has been directed in the case of witnesses for the Crown, himself assisting in the examination in chief, and permitting the prosecutor or counsel appearing for the Crown to cross-examine, and himself putting such questions on the cross-examination as may occur to him as proper for the discovery of the truth or the elucidation of the matter under investigation, and may direct that witnesses be called in reply or in explanation; all of which depositions should be signed by the witnesses respectively and by the justice, and returned along with the depositions in chief to the Clerk of the Crown and Peace.

3. So far the justice has been acting *ministerially;* and he must always bear in mind that, in every stage of the investigation, the proceedings before him are not a *trial*, but merely an *inquiry;* in which he is not to pronounce the guilt or innocence of the accused, but simply whether or not reasonable and probable causes exist for putting the accused upon his trial; and it is highly desirable, both for the prisoner and in the interest of public justice, that the examination of the witnesses, both against and for the prisoner should be of the most searching character; and as the language of the statute is broad enough, the justice should continue his inquiries as long as anything can be elicited from the witnesses respecting the guilt or innocence of the prisoner; or which may tend to implicate accomplices, or others, not yet arrested, in the offence; for the proceeding is both for *inquiry* and *discovery*.

4. The evidence having been closed on both sides, the justice may in his discretion hear argument from counsel against and for the prisoner. He then proceeds to act on the case before him; and he should bring to bear upon all the evidence, and the *facts* and *circumstances of the case in evidence*, and the law relative thereto, his best understanding and judg-

ment. In this stage of the proceedings, and to the extent of determining whether the prisoner shall be adjudged to take his trial or be altogether discharged, the justice is judge both of the law and the facts. From the evidence, he must find that certain facts do or do not exist, or at least that the evidence raises a reasonable suspicion that they do exist; and then, assuming that they do exist, or that there is reasonable ground for a reasonable suspicion of their existence, he must determine the law applicable to the facts, and decide whether or not an offence in law has been committed. In doing this he may have to construe one or more statutes; or he may have to decide whether a statutory or a common law offence has been committed; for all offences must be either statutory or at common law; and the justice in his own mind should clearly distinguish which it is, and if, in his judicial consideration of the whole question, he should come to the conclusion that no offence has been committed, or if committed, that the evidence taken altogether, both for and against the prisoner, does not raise such a probable and reasonable suspicion of the guilt of the prisoner as to require further judicial inquiry by a formal trial in Court, he should at once discharge him from custody. On the other hand, if assuming the existence of the facts, an indictable offence has been committed, and a like consideration of the whole evidence leads his mind to the conclusion that the accused is guilty of the offence charged, or that there is reasonable or probable suspicion of his guilt, he should either commit him or hold him to bail for trial in the proper court. In the discharge of this part of his duty, the justice may encounter cases of considerable nicety and difficulty, as when there is conflicting or suspicious testimony, or where the complainant from a preconceived idea or pre-committed opinion, from feelings of personal differences or private pique, malice, hatred or revenge, obstinately and pertinaciously adheres to an accusation once made; and it seems impossible to lay down precise and invariable rules for his guidance under such circumstances. He must act on his own responsibility. If he acts honestly and with purity of intention, and according to the best of his judgment, in the important trust reposed in him by Her Majesty—always keeping in view that this *inquiry* is only *preliminary* and for *the purpose of discovery* and with the object I have already pointed out—he has nothing to apprehend.

All indictable offences are classed under *felonies* and *misdemeanors*. In felonies the accused is generally designated *the prisoner;* in misdemeanors, *the defendant*. In the case of felonies the accused invariably takes his place in the dock; in misdemeanors he is not obliged to do this. In many cases of misdemeanor the offences partake very much of the nature of private wrongs, and are much more frequently promoted by private individuals rather from personal considerations than on public grounds. In this category may be classed perjury, subornation of perjury, conspiracy, false pretences, keeping a gambling house, keeping a disorderly house, and any indecent assault; although it must be confessed all of these offences are grave crimes against society at large. By the Imperial Act 22 & 23 V., c. 17, sec. 1, and the Canadian Act 32 & 33 V., c. 29, sec. 23, no bill of indictment is to be

found by any grand jury for any of the foregoing offences, unless the charge has been previously investigated before a magistrate, or unless the indictment be preferred by consent of a judge or the attorney or Solicitor General; and the reason assigned by the legislature for excepting these cases from the general rule is "*to prevent vexatious indictments.*" On the argument, I called the attention of the counsel for the prosecution to the exception which the legislature had made both in England and Canada in respect of these offences, and I asked him if it had ever occurred to him why it had been done. He replied, in order to enable the accused to cross-examine the witnesses against him. But it is quite manifest this was not the reason; for if so it would apply with much greater force to felonies and more aggravated offences. The real reason is given by the legislature, "*to prevent vexatious indictments.*" I have no doubt it was the intention of the legislature, and is the meaning of the law, that the accused in these charges should have the advantage of a thorough investigation and the opportunity of a full explanation and defence in the primary inquiry before the justice, so that if possible he might altogether exonerate himself, or render the suspicion of guilt so doubtful or improbable as to justify his being altogether discharged.

Of these offences, false pretences and perjury are so easily charged, and so often originate in a desire to redress a fancied private wrong, that in the primary investigation and inquiry, the greatest care and circumspection should be exercised by the justice whose duty it may be to take the preliminary investigation. Especially should he be cautious in the case of a charge of wilful and corrupt perjury; the bare imputation of which is so damaging to the reputation and so mortifying to the feelings and humiliating to the spirit of an honorable and high-minded man. All experience teaches us that we are so liable to be mistaken in respect of incidents and events passing directly before our eyes or within our hearing, caused by momentary inattention, or by mental assumption or pre-conceived ideas, of what should take place, that two or more persons, seeing or witnessing the same occurrence or event, or hearing the same statement made, will often give each an account of what transpired quite different from, and sometimes contradictory of that of the others, and yet each honestly intending to narrate the facts as they are impressed on his memory. This is seen every day in courts of justice, in cases of riots, assaults and batteries, and public commotions, and in cases of verbal contracts and the statements of the parties to others in respect of them; and hence a superficial observer of men and things might infer that perjury is much more general than a careful analysis of the understanding, and a thoughtful consideration of what is daily passing before us, justify. Where the proof is documentary or chiefly so, one difficulty is in a great measure overcome. The embarrassment arises when evidence is limited to verbal declarations, not immediately reduced to writing, but resting on the apprehension of *what was intended to be said* and the uncertain record of *slippery memory of what was actually said.* The evidence of the prosecutor, under such circumstances, however positive, and however credible he may be, is not enough to warrant a hasty judgment, although cor-

roborated by separate and independent testimony; provided it appears that the prosecutor has some personal feeling in the matter and that both he and the corroborating witnesses are flatly contradicted by several witnesses of equal credibility who have the same means of knowing the facts, and who are free from all bias one way or the other; and when to all this is added the previous good character for truth and veracity of the defendant in the community in which he has lived and is known, and no sufficient motive is discovered for the commission of so odious an offence, with the certain knowledge that, if committed, it easily and almost instantly could, and in all probability would, be detected and brought to light, and himself subjected to a criminal prosecution, the justice should act with still greater hesitation, caution and deliberation. I venture the suggestion under such circumstances that the examining justice should require something more than the positive oath of the complainant corroborated by another witness. If, after consideration of the whole case, the nature of the charge, all the evidence that has been or can be adduced on both sides, the position of the parties in society, the motives inducing the prosecution, the means of detection, the probability of exposure and conviction, and all the surrounding circumstances—if, I say, after weighing all these, he thinks the offence has been committed—that the evidence raises such a reasonable and probable presumption of guilt that a jury would be justified on the trial in finding the defendant guilty, he ought to commit or hold him to bail for trial; otherwise, he should dismiss the charge. Character and reputation are of too much value to permit them to be trifled with, to gratify private resentment or personal feelings of revenge.

At the same time, however malicious or vindictive the prosecutor may be, and whatever may be the consequences to character and reputation, if the odious crime of wilful and corrupt perjury has been committed, and the whole evidence taken together and viewed in the light of the surrounding circumstances sustains the charge, and the justice is so impressed, he ought fearlessly to discharge his duty, and commit the defendant or hold him to bail to take his trial before a jury of his country. At the same time it should be borne in mind that, notwithstanding the proverb to the contrary, a good name once associated with an odious charge, is in the public mind too often inseparably connected with that offence, however groundless may have been the accusation; and even when the truth is demonstrated, and the wrong done is known and acknowledged by all, re-action seldom or ever takes away the scandal or makes reparation and restitution for the evil done. While, therefore, the magistrate should be the impartial minister of public justice, he should at the same time be the shield and the protector of the reputation of individual character.

In the case under consideration, I think the examining justice was in error in deciding he had no power to hear any witnesses except such as were called by the prosecution. On the contrary, I think he was bound to hear at least those witnesses who, he was informed, or who in the course of the inquiry he learned knew the facts and circumstances of the case, whether they were called by the prosecutor or not; and I think he was also in error in deciding that he had no

power to hear witnesses expressly called as witnesses for the defence—it being a matter, as I think the law is, entirely in his discretion—generally to be exercised in favor of the liberty and innocence of the subject—indeed, I may say, always to be so exercised, unless he sees that the ends of justice might thereby be frustrated or embarrassed. In the former case it is clear a *mandamus* should go, in the latter it is equally clear that the writ should go to the extent of commanding the stipendiary magistrate to exercise his discretion, *both of which are purely ministerial acts.* After the magistrate has complied with the writ, it will then be for him to make such order in the premises, on the whole case before him, as to him shall seem just and proper. In coming to his decision, he must consult his own judgment; and he is not answerable to any tribunal for the decision at which he shall arrive. But to permit the *mandamus* to operate, I must vary the order to hold to bail, so that it and the recognizance thereunder given, shall stand for the appearance of the defendant on a further examination on the charge preferred against him, at such time and place as the magistrate shall appoint, and of which he shall give the defendant reasonable notice. I make the order accordingly.

In addition to the foregoing reports and remarks, the Reporter submits for the guidance of country magistrates the following valuable information, taken from that excellent work, Kerr's "Magistrates Acts," published by Dawson Brothers, Montreal:—

THE NATURE OF THE DUTIES OF JUSTICES OF THE PEACE.

The acts of Justices of the Peace in the discharge of their duty are either ministerial or judicial. Receiving informations or complaints for indictable offences, and also for offences or matters determinable in a summary way; causing the party charged to appear and answer either by summons or by warrant; causing, in the case of summary convictions or orders, such conviction or order to be executed by warrant of distress or of commitment, are ministerial acts.

Taking the examinations and bail, or committing for trial on charges for indictable offences (Linford vs. Fitzroy 3. N. S. C. pp. 443, 444; contra Okes Syn. p. 5), the trial of offenders, the hearing and adjudication, upon informations for summary offences, and upon complaints for non payment of money under acts giving them summary jurisdiction, and in fact all acts by them done whereby they decide between rival claims, are judicial acts.

JURISDICTION OF JUSTICE AS TO LOCALITY, INTEREST, &C.

By the 32 & 33 Vic. c. 30, the authority of Justices of the Peace with respect to the preliminary examination into indictable offences of all kinds is defined.

By the 32 & 33 Vic. c. 31, general rules and orders for their guidance in summary informations and complaints, over the subject matter of which the Parliament of Canada has jurisdiction, are laid down.

In summary convictions, the jurisdiction of Justices is wholly given to them by Statute. (Paley p. 15; Okes Syn. p. 7.)

If by the Act or Law upon which the complaint or information is framed it be provided that it shall be heard and determined by two or more Justices, then it must be heard by

the number, at least, of Justices therein specified (Vide 32 & 33 Vic. cap, 31. sec. 27. and post). But if there be no such provision in such Act or Law then it can be heard and determined by one Justice. (Vide 32 & 33 Vic., cap. 31. sec. 28).

Where power is given to one justice to do an act, two or more can join in doing it.

One Justice can receive an information and complaint and enforce any summary conviction or order made by another or other Justices (32 & 33 Vic. cap. 31 secs. 85 & 86), and can do every act out of sessions relative to any indictable offence, save admitting, after hearing the witnesses, a person accused of felony, to bail for his appearance for trial. (32 & 33 Vic. cap. 30).

The primary jurisdiction of Justices extended solely over offences, committed in the Division for which they were appointed.

In indictable offences, now a days a Justice has jurisdiction to take the preliminary examination when the offence has been committed in the Division for which he has been appointed, *or when the party accused is therein or is suspected to be therein* (32 & 33 Vic. cap. 30. sec. 1.)

In summary convictions and orders it would appear as if the offence or act complained of need not have been committed or done within the Division for which the Justice has been appointed, so long as the person accused is within such Division. (but vide 32 & 33 Vic. c. 31 s. 1).

Where a statute refers the matter to the next Justice or any two Justices, no other but those answering that description or those having express jurisdiction by Act of Parliament can take cognizance of the matter. (Sanders case 1, Saund. 263: Re, Peerless 12. Q. B. 643.)

Generally speaking, the place where the Justices can exercise their authority must be within the territorial Division for which they are appointed to act. (Dalt. c. 6.) It is very doubtful whether a justice can out of his Division receive an information to found a subsequent proceeding before himself of a penal nature, and it is clear that any coercive or judicial act would be altogether invalid unless done within the Division. (Dalt. c. 25, 2 Hawk c. 8. s. 44. Paley p. 18).

JUSTICES INTERESTED IN THE CASE.

No Justice of the Peace can act judicially in a case wherein he is himself a party, or wherein he has any direct, or pecuniary interest however small. That no one can be a judge in his own case is a principle pervading every branch of law. (Co. Lit. 141. a; Dalt. c. 173; Dimes vs. Grand Junction Canal Co. 3. H, of L. Cases 759, 785). Every proceeding which bears this objection upon its face is absolutely void, if it do not so appear it is merely voidable. (Dimes vs. Grand Junction Canal Co. supra). A Justice acting when interested, is liable to punishment by attachment. (The Mayor of Herefords case 2 Ld. Raym. 766: 1 Salk. 201, 396; R. v. Hoseason 14 East 606).

Justices should refrain from taking part in any matters in which they individually have a personal interest; such as where they are members of a company, or stockholders in a bank, complaining or complained against. Where a Justice upon the trial of a parish appeal, he being a rated inhabitant of the appellant parish was on the bench during the

hearing, though he did not vote or give any opinion upon the question or influence the decision, the order of sessions was held to be invalid by reason of his presence and interference. R v. Justices of Suffolk 21. L. J (N. S) M. C 169; Reg. v. O'Grady 7 Cox C. C. 247.)

Sometimes however a Justice of the Peace is expressly empowered by statute to adjudicate, although to a certain extent interested in the result of the decision. But great care must be exercised by a Justice interested in a case, ere acting therein as a magistrate, to assure himself that he is so expressly empowered.

OUSTER OF JUSTICES JURISDICTION.

Where property or title is in question, the jurisdiction of Justices to hear and determine summarily in in the cases regulated by 32 & 33 Vic. c. 31 and other cases of the same class of summary matters is ousted, and their hands tied from interfering, though the facts be such as they have otherwise authority to take cognizance of. (R v. Burnaby 2 Ld. Ray, 900; 1 Salk. 181; R. v. Speed 1 Ld. Raym. 583; Kimmersley v. Orpe Doug. 499). This principle is not founded upon any legislative provision, but is a qualification which the law itself raises in the execution of penal statutes and is always implied in their construction.

The jurisdiction however is not to be ousted by a mere fictitious pretence of title, or even by the *bona fide* claim of a right which cannot exist at law. (R v. Doelson 9 Ad & El. 704; Hudson v. Macrae 33 L. J. (N. S) M. C. 95; Okes Syn. 31; Paley 117-122).

[It does not follow from this, however, that a wrong complained of as, for instance, an assault when asserting or defending a title to lands, etc., is without remedy; it is only meant that the case must be sent for examination and adjudication to a superior court of record,—in this Province, to the Court of Queen's Bench.—REPORTER.]

GENERAL INGREDIENTS TO GIVE JUSTICES JURISDICTION.

The principal requisites or ingredients in general necessary to give justices jurisdiction to exercise their authority are therefore the following:

Jurisdiction as to *place* where offence was committed, matter arose or where accused *then is or is suspected to be.*

Jurisdiction as to *place* of exercising their authority.

Jurisdiction not to be exercised where Justice is a party, or interested:—

When Justices are prohibited by Statute from exercising.

When Justices are disqualified from acting within their jurisdiction by other causes than interest;

When their jurisdiction (in all other respects complete) is ousted by a question of property or title.

In addition to these there must be :—

Jurisdiction over the *subject matter* within the strict meaning of the commission, or the particular Statute, taking into account all exceptions and exemptions allowable;

Jurisdiction in respect of the *Justices description* where the authority is delegated to particular justices;

Jurisdiction as to the *time* of offence or matter being prosecuted within the period limited by statute or otherwise;

Jurisdiction as to the *number* required to hear and determine;

Jurisdiction as to the *amount* of forfeiture or penalty compensation

and its nature, and costs adjudged to be paid, and the *mode* of their recovery by distress or otherwise, but appropriate to the offence and the Statute;

Jurisdiction as to the term of imprisonment adjudged, neither for too short nor too long a period, and the proper condition of its termination.

Jurisdiction should be apparent on written proceedings of Justices:—

It is not sufficient that Justices have the jurisdiction in every respect; upon all their written proceedings, especially in those records of their judgments which are final, i. e. convictions and orders, as the bad part cannot be severed from the good (Wilkins v. Wright 2 C. & M. 191; Braceys case 1 Salk 349; R. v. Corben 4 Burr. 2218; R v. Catherall 2 Str 900; 1 T. R. 249) in the case of convictions, though orders may be quashed in part if sufficiently divisible (R. v. Maulden 1 M. & R. M. C. 385; R. v. Robinson 17 Q. B. 466, 471; R. v. Green & al. 20 L. J. (N. S.) M, C. 168 & cases therein cited), every essential ingredient and every material fact necessary to give jurisdiction should appear. (Okes Syn. p. 33; Paley 140, 141, 148; Gossett vs, Howard 10. Q. B. 411, 452; Peacock v. Bell 1 Saund. 74).

EVIDENCE BEFORE JUSTICES.

It is not intended here to enter into a consideration of the whole law of evidence, a very succinct view of the law as to the competency and examination of witnesses, and the general rules as to oral and other evidence will only be presented, taken in great port from Mr. Okes' exceedingly useful work, The Magisterial Synopsis. This chapter is divided into three parts.

According to the principles of English law it may be said, that there is no difference in the rules of evidence applicable to civil and criminal cases, and that what may be received in one case may be received in the other, and what is rejected in the one ought to be rejected in the other (Abbott J. in R v. Watson 2 Star N. P. C. 155), and that a fact must be established by the same evidence, whether it is to be followed by criminal or civil consequences (Lord Melville's case 29 How, St. T. 763), yet the amount of proof to be exacted by justices varies with the nature of the proceedings before them.

If it be a preliminary inquiry into an indictable offence, the evidence must raise a strong presumption of the guilt of the party charged to justify the justice in committing him for trial (see 32 & 33 Vic. cap. 30. s. 52).

In summary penal proceedings the proof of guilt must be full and convincing, while in matters of civil jurisdiction, a mere preponderance of proof will suffice to establish the case. In summary proceedings, the justices are placed in the position of a jury, and the degree of credit to be attached to the evidence, provided it be legally admissible, is exclusively in their consideration and judgment, the defendant being entitled to the benefit of any doubt which exists in their minds; and therefore, whatever the Court of Queen's Bench upon an inspection of the proceedings, would deem sufficient to be left to a jury on a trial, when the evidence was set out on the face of the conviction, was considered by them adequate to sustain the conclusion drawn by the convicting magistrates. Beyond that, the Court would not exercise a judgment upon the credit or weight due to the facts, from which the conclu-

sion was drawn (R. v. Davis 6. T. R. 177, & see Coster v. Nilson 3 M. & W. 411; R. v. Reason 1 T. R. 375; R. v. Bolton 1 Q. B. 66; Saunders. Prac. M. C. 3. Ed. p. 66).

THE COMPETENCY AND EXAMINATION OF WITNESSES.

It may be considered to be the general and established principle of evidence that objection may be taken to the credibility, but not to the competency, of witnesses; but this rule is subject to some exceptions. Formerly a witness might be objected to on many grounds, as being a party interested in the result of a case; but without mentioning prior acts of the Provincial Parliaments, the Dominion act 32 & 33 Vic. cap. 29, s. 62 provides:

"No person offered as a witness shall, by reason of any alleged incapacity from crime or interest, be excluded from giving evidence on the trial of any criminal case, or in any proceeding relating or incidental to such case."

63 "Every person so offered shall be admitted and be compellable to give evidence on oath, or solemn affirmation, where an affirmation is receivable, notwithstanding that such person has, or may have, an interest in the matter in question, or in the event of the trial in which he is offered as a witness, or of any proceeding relating or incidental to such case, and notwithstanding that such person so offered as a witness has been previously convicted of a crime or offence"

It may be taken for granted that under these two clauses all persons gifted with reason who believe in a Supreme Being, who will punish them either in the present, or in the future life, for perjury, (Powell 19, 21) (save the accused and his wife, on a charge of an indictable offence not committed by him on her person, and the defendant and his wife in the case of a summary prosecution not founded upon a personal injury to her), are competent witnesses.

In cases of high treason and personal injury committed by one upon the other, husband and wife are not excluded from giving evidence for or against each other. (Okes Syn. 66 & note 82).

The wife of one of several persons accused of a joint offence can, under certain circumstances, be examined as a witness for the other persons accused. (R. v. Bartlett & al 8. J. P. 329; R. v. Moore 1 Cox C. C. 59; R. v. Sills 1 C. & K. (494).

Where two prisoners were tried for a joint offence, and one pleaded guilty, the wife of the one so pleading was admitted as evidence against the other prisoner. (Reg. v. Thompson 3 F. & F. 824).

A person can not be compelled to answer any question, tending to subject him to some penalty or punishment (Reg v. Boyes 1 B. & S. 311), but if he chooses he is competent to do so. In the recent case of Reg. v. Butterfield 11 Law T. N. S. 448, it was held that a witness was not obliged to answer a question tending to the forfeiture of a lease. (See Taylor on Ev. 4th Ed. pp. 1236—1248),

The proceeding to obtain a summary conviction by which the defendant may be punished by fine or imprisonment is a proceeding in a criminal case (Cattell vs. Ireson 27 L. J. (N. S.) M. C. 167; Parker v. Green 2. B. & S. 299.) The proceedings to obtain merely orders for the payment of money are civil proceedings. (Cattell vs. Ireson supra).

Independenly of the 32 & 33 Vic.

c. 29 which removes a person's incapacity from crime, the law is, that where several offenders are charged and the cases are heard at one time, *after all the evidence on both sides has been heard*, if there be no evidence against one of them he is then entitled to demand an acquittal. (Wright vs. Palin R. & M. C. C. 128,) but he is not entitled to a verdict in the midst of the inquiry, (Emmett vs. Butler 7 Taunt 599) although the Court may in its discretion allow of his acquittal at any stage of the trial before the reply, in order that he may be examined as a witness (Bedders case 1 Sid. 287; 2 Hawk. P. C. c. 46. s. 98). When acquitted he is competent (Fraser's case 1 Mac-Nal Ev. 55; R. v. George, Car & Mar. 111); also where one of several defendants pleads guilty, he may be called as a witness for the other defendants before sentence, unless he has an interest, as in conspiracy in obtaining their discharge. (R. v. George, Car & M. 111; See Taylor on Ev. 4th Ed. pp. 1155, 1156.)

Power and duty of Justices to administer oath to witnesses;—

It may be laid down as a general rule, that wherever Justices are authorized by Act of Parliament to hear and determine, or examine witnesses, they have incidentally a power to take the examinations on oath or solemn affirmation as the case may be, and in fact examinations not on oath or solemn affirmation, with one exception hereafter to be noticed, are not evidence.

The oath is generally in the following form,

Form of oath.

"The evidence you shall give "touching this information (*or* com- "plaint *or* the present charge *or* the "application *or as the case may be*) "wherein is informant (*or* "complainant *or as the case may be*) "and is Defendant (*or as* "*the case may be*) shall be the truth, "the whole truth, and nothing but "the truth. So help you God." the New Testament should be, during the administration of the oath, held in the witness' right hand and at its conclusion he should kiss it.

Quaker.

If the witness be a Quaker or other person allowed by law to affirm instead of swearing in civil cases, or solemnly declaring that the taking of any oath is according to his religious belief unlawful, he is permitted to make his solemn affirmation or declartion of the facts he affirms to, commencing it with the words "I, "A. B., do solemnly, sincerely and "truly declare and affrm that &c," (32 & 33 Vic. c. 29. s. 61.)

The forms of oath under which God is invoked as a witness, or as an avenger of perjury, is to be accommodated to the religious persuasion which the swearer entertains of God, and to be administered in such form as is binding on the witness' conscience; it being vain to compel a man to swear by a God in whom he does not believe, and whom he does not therefore reverence.

But if a person says he has no belief in a God, or in a future state, he cannot be sworn, and his evidence cannot be received (Maden v. Catanagh 26. J. P. 248; Powell; 22 Taylor on Ev. p. 1251).

The Scotch oath is thus administered; holding up his right hand uncovered, the witness repeats after the Clerk (who ought to administer the oath with solemnity and reverence, standing); "I swear by Almighty God, and as I shall answer to God at the great day of judgment, that I

will tell the truth, the whole truth, and nothing but the truth, in so far as I know and shall be asked in this cause." (Vide with slight alterations forms in Mildranes case 1 Leach 412 ; & Mee v. Reid, Peake N. P. C. 23).

Deaf and dumb witnesses, as well as others who do not speak the language spoken by the justice, should be sworn through the medium of another person duly qualified to interpret them, the interpreter being first sworn faithfully to interpret what the witness may say. The interpreter's oath may be in the following form :

" You shall truly and faithfully interpret the evidence about to be given, and all other matters and things touching the present charge (*or information* as the case may be) and the (French *or as the case may be*) language into the English language, and the English language into the (French *or as the case may be*) language, according to the best of your skill and ability—So help you God.

MODE OF EXAMINATION OF WITNESSES.

On an examination in chief a witness must not be asked leading questions, i.e. questions in such a form as to suggest the answers desired. There are several exceptions to this rule : 1o. With the permission of the Court, when the witness is hostile to the party by whom he is examined. 2o. Where a witness has apparently forgotten a circumstance, by inspections of a memorandum to refresh his memory (Powell 376, 379) ; 3o. Where the object is to contradict another witness as to a certain fact. 4o. Where the object is to identify persons. 5o. Where the question is merely introductory to another. A witness must be asked only questions of fact which are relevant and pertinent to the issue ; and he cannot be asked irrelevant questions, or questions as to his own inferences from a personal opinion of fact.

By the 32 & 33 Vic. cap. 29 it is provided that :

s. 68 " A party producing a wit-
" ness shall not be allowed to impeach
" his credit by general evidence of
" bad character, but in case the wit-
" ness in the opinion of the Court,
" proves adverse, such party may con-
" tradict him by other evidence, or
" by leave of the Court, may prove
" that the witness made at other
" times a statement inconsistent with
" his present testimony, but before
" such last mentioned proof can be
" given, the circumstances of the
" supposed statement, sufficient to
" designate the particular occasion,
" must be mentioned to the witness,
" and he must be asked whether or
" not he did make such statement."

On cross examination, a witness may be asked leading questions ; but where the witness appears to be favorable to the party cross-examining, the Court will sometimes not suffer him to lead his opponent's witness. (Powell 381).

The office of a re-examination is to be confined to showing the true color and bearing of the matter elicited by cross-examination ; and new facts or new statements not tending to explain the witness' previous answers, are not to be admitted (Prince vs. Samo 7 Ad. & E. 627 ; Queen's Case 2. B. & B. 297 ; Powell 390).

GENERAL RULES AS TO ORAL AND OTHER EVIDENCE.

From the various decisions and authorities the following rules have been extracted :

1.—One witness is sufficient, if he can prove the necessary facts, ex-

cept where any statute declares there must be two witnesses, as in High Treason, and in cases of perjury.

2.—The evidence offered must correspond with the allegations and be confined to the points in issue (Taylor sec. 172).

3.—The best evidence of which the nature of the case is capable must be given, and this rule relates not to the measure and quantity of evidence, but to the quality. (Powell 36).

4.—The law presumes innocence until the contrary be proved. (Powell 45).

5.—Hearsay evidence is inadmissible. (Powell 70).

6.—The issue must be proved by the party who states an affirmative; not by the party who states a negative. (Powell 167. Vide 32 & 33 Vic. c. 31 s. 43).

7.—The issue must be proved by the party who states the affirmative in substance. and not merely the affirmative in form. (Powell 168).

8.—In every case the onus probandi lies on the person who wishes to support his case by a particular fact, which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant. (Powell 170).

9.—It is enough if only the substance of the issue be proved. (Powell 172).

10.—Where two persons are charged jointly, the confession, or statements of one will not be evidence against the other. (Powell 164).

11.—On trials for conspiracy, where the conspiracy has been proved, the acts of one conspirator are evidence against the other conspirators. (Powell 164).

12.—Conversations which have taken place out of the hearing of the party to be affected cannot be given in evidence.

13.—That the evidence of an accomplice is admissible, but ought not to be fully relied upon, unless it be corroborated by some collateral proof. (Powell 24).

14.— That where positive evidence of the facts cannot be supplied, circumstantial or presumptive evidence is admissible; and that circumstantial evidence should be such as to produce nearly the same degree of certainty as that which arises from direct testimony, and to exclude a rational probabitity of innocence. (1 Starkie on Ev. 3. Ed. pp. 571. 575).

15.—The law presumes in criminal matters, that every person intends the probable consequences of an act which may be highly injurious. (Powell 46).

16.—It is a general presumption of law that a person acting in a public capacity is duly authorized to do so. (Powell 48).

17.—If a man by his own wrongful act withhold the evidence by which the nature of his case would be manifested, every presemption to his disadvantage will be adopted. (Powell 49).

18.—The law presumes in favor of the continuance of life. (Powell 50).

19.—A tenant cannot dispute his landlord's title. (Powell 52).

20.—A witness must only state facts; and his mere personal opinion is not evidence. (Powell 54, see exception No. 21).

21.—The opinions of skilled or scientific witnesses are admissible evidence to elucidate matters which are of a strictly professional or slientific character. (Powell 55).

22.—Counsel, solicitors and attorneys cannot be compelled to disclose communications which have been made to them in professional confidence by their clients. (Powell 60);

Nor can Priests and Ministers be compelled to disclose secrets confided to them in confession made under the regulations of their respective churches or persuasions.

23.—A witness cannot be compelled and will not be allowed to state facts, the disclosure of which may be prejudicial to any public interest. (Powell 66).

24.—In matters of public or general interest, popular reputation or opinion, of the declaration of deceased witnesses, if made before the litigated point has become the subject of controversy, and without reasonable suspicion of undue partiality or collusion, will be received as competent and credible evidence. (Powell 78).

25.—The declarations of deceased persons are not admissible as reputation, unless they have been made before the issue has become, or appeared likely to become, a subject of judicial controversy. (Powell 87).

26.—Ancient documents purporting to be part of the transaction to which they relate, and not a mere narrative of them, are receivable in evidence that those transactions actually occurred, provided they be produced from proper custody. Powell 89).

27.—In murder or homicide, the declarations of the deceased, concerning the cause and circumstances of the mortal wound, if made with a full consciousness of approaching death and religious responsibility, are admissible in evidence for or against a prisoner who is charged with the crime. (Powell 107).

28.—The admission of a partner is evidence against his co-partner in civil proceedings (Powell 142, 156); under which rule is included admissions by persons acting in the character of agents or attorneys.

29.—Voluntary statements or observations made by a prisoner before the examining magistrate are strictly admissible against him, whether reduced into writing or not. (1 Phill. 422; Reg. v. Stripp. 1 Dears. C. C. 648; 1 Lea. 309).

30.—According to the rule, that the best evidence must be given (ante rule 3,) and that secondary evidence is inadmissible until the absence of primary evidence is explained satisfactorily, a party who relies upon a written document, must either produce it, or show that he has made every reasonable effort to produce it. In the latter case, if he has been unsuccessful, he may prove the original document, either by a copy, or any other authentic kind of secondary parol evidence. (Powell 295).

31.—The rule is, that all originals must be accounted for, before secondary evidence can be given of any one. (Parke, B. Alison v. Furnival, 1 C. M. & R. 392).

32.—It must first be proved that that the original is in the hands of the adverse party, and that a notice to produce has been served on such a party a reasonable time before the hearing; but where the document is in the hands of a third party, a subpœna *duces tecum* must be obtained from the crown office, justices having no power in any case to summon a witness and require him to produce documents before them. (Powell 299, 301).

33.—If a party or his attorney be shown to have an original with him in court, and refuses to produce it, secondary evidence will be received, notwithstanding the want of a notice to produce;

34.—Notice will not be required when the adverse party has admitted the loss of the original or where it is

in the nature of an irremovable fixture ;

35.—The proof of signatures or handwriting is the essential part of the proof of private writings ; there are various admissable kinds of such proof.

1.—Handwriting may be proved by a witness who actually saw the party write or sign, which is the most satisfactory evidence ;

2.—By a witness who has seen the party write on other occasions, even if it be but once only ;

3.—By a witness who has seen documents purporting to be written by the same party, and which, by subsequent communications with such party, he has reason to believe the authentic writings of such party;

4.—By 32 & 33 Vic. c. 29 s. 67 (applicable to all Courts and proceedings of a criminal nature) "comparison of a disputed handwriting with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses ; and such writings and the evidence of witnesses respecting the same, may be submitted to the Court and Jury as evidence of the genuineness or otherwise of the writing in dispute."

Should there be an attesting witness to the writing he must in certain cases be called ; but by 32 & 33 Vic. c. 29, s. 66, in all cases, it is not now "necessary to prove by the attesting witness any instrument, to the validity of which attestation is not requisite, and such instrument may be proved as if there had been no attesting witness thereto."

To this reservation there are several common law exceptions. Thus it is a rule that—an attesting witness need not be called to prove an instrument which is more than thirty years old ; or when the original is held by an adverse party, who refuses to produce it after notice (Okes Syn. p. 84), or when the adverse party, in producing it, after notice, claims an interest under it ; or when the adverse party has recognized the authenticity of the instrument by acts in the nature of an estoppel in a judicial proceeding (Okes Syn. p. 84), or when the attesting witness is proved to be dead, insane, beyond the jurisdiction of the Court, or otherwise not produceable after due endeavors to bring him before the Court. It will be sufficient generally to prove in these cases the handwriting of the attesting witness. (Powell 307).

36.—Documents will often be admissible to refresh the memory of a witness, and the witness may give oral evidence accordingly after a perusal of their contents :—

1.—When the writing actually revives in his mind a recollection of the facts to which it refers ;

2.—When although it fail to revive such a recollection, it creates a knowledge or belief in the witness that, at the time when the writing was made, he knew or believed it to contain on accurate statement of such facts ;

3.—When although the writing revives neither a recollection of the facts, nor of a former conviction of its accuracy, the witness is satisfied that the writing would not have been made, unless the facts, which it purports to describe, had occurred accordingly. (Powell 309).

37.—Justices of the Peace take judicial notice of numerous facts without proof, as the public Statutes of the Imperial Parliament ; the Statutes of the Dominion of Canada ; their own course of procedure and practice ; the maritime law of nations ; the great and privy seals of

the realm ; royal proclamations ; the divisions of the year ; Territorial Divisions of the Dominion of Canada ; the Canada Gazette ; but they will not notice the laws or customs of foreign States, and such laws must be proved by skilled witnesses. So also must local laws of the Provinces other than the one for a Division of which the Justice has been appointed. (Vide Powell 242. Taylor. sec. 7 ; Okes Syn. p. 85).

Other documents are proved as follows : Judgments of Courts of Record by certified copy under Seal of Court.